

AN EMERGING RIGHT FOR MATURE MINORS TO RECEIVE INFORMATION

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It is well recognized that "[c]onstitutional rights do not mature and come into being magically only when one attains the state-defined age of majority."¹ That statement, frequently quoted but inadequately explicated, points to a central distinction between minors and adults. Each adult is entitled to exercise the full panoply of constitutional rights, regardless of his or her ability to understand or rationally exercise those rights.² Children also possess constitutional liberties, but each liberty asserted by a minor may ripen at different times and in different contexts.

Debate over the parameters of children's constitutional rights remains contentious.³ For minors, compared to adults,

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¹ *Planned Parenthood of Cent. Mo. v. Danforth*, 428 U.S. 52, 74 (1976).

² Certain rights may be restricted for particular categories of adults such as prisoners. See *Thornburgh v. Abbott*, 490 U.S. 401, 404 (1989) (holding that prison officials may restrict access to publications detrimental to institutional security).

³ Notwithstanding his thoughtful critique of the "cult of rights," Professor Lynn Wardle has captured the essence of the imperative that children be included in the group that may exercise rights:

[T]he concept of rights . . . marks the minimum essential protections that all persons owe to each other in our society. Children are humans, too If we exclude any human beings from our system of rights, we violate one of the fundamental principles on which our constitutional system of laws, and our very society, is established

Lynn D. Wardle, *The Use and Abuse of Rights Rhetoric: The Constitutional Rights of Children*, 27 LOY. U. CHI. L.J. 321, 338 (1996); see also Katherine Hunt Federle, *Children, Curfews, and the Constitution*, 73 WASH. U. L.Q. 1315, 1344-68 (1995) [hereinafter *Children, Curfews, and the Constitution*] (arguing for empowerment of children by recognizing substantive rights for minors that are as close as possible to

any particular liberty is more likely to be limited in relation to the minor's capacity and the societal interests involved.⁴ Although presumably, the level of constitutional protection of minors' rights increases with maturation, the precise scope of each right at different stages, prior to the age of majority, remains ambiguous. In order to exercise the range of rights that ripen as minors mature, young people need access to ideas, protected under the First Amendment, that will inform their increasing autonomy and understanding. In this article, I propose a theory for an emerging claim under the United States Constitution: minors have a right to receive information in some circumstances, regardless of the limitations imposed by their parents.⁵

Those who look upon the rights of children with skepticism may wonder why young people cannot wait to obtain controversial information until they reach the age of majority. Such skeptics may also doubt that any contemporary teenagers remain who have not been exposed to ideas of which their parents disapprove. But consider the hypothetical situation of a sixteen-year-old girl who knows she is dying of leukemia. She may not live to reach the age of eighteen, and she wants to make peace with her God. She is not sure, however, if her God is the same as the God of her parents who belong to a particularistic sect and have raised her in isolation from ideas in general circulation. In order to set her mind—and, arguably her soul—at ease, she wants to learn about a variety of spiritual and religious views so that she can embrace the belief system that she truly believes in. She needs information, and she needs it right away.

The argument that teenagers have a right to knowledge despite their parents' objections draws from three strands of existing jurisprudence. First, it relies on the line of First Amendment theory that the right to speech includes an inte-

those afforded adults); Katherine Hunt Federle, *On the Road to Reconceiving Rights for Children: A Postfeminist Analysis of the Capacity Principle*, 42 DEPAUL L. REV. 983 (1993) (arguing that "capacity" should not affect the availability of rights). Compare, e.g., Wendy Anton Fitzgerald, *Maturity, Difference, and Mystery: Children's Perspectives and the Law*, 36 ARIZ. L. REV. 11, 30-34 (1994) (arguing that because the "liberal jurisprudential framework" that promotes rights for children is largely irrelevant to the day-to-day lives of young people the law should listen to the unique perspectives of children).

⁴ See *infra* Part I.B.

⁵ I have argued elsewhere that children may have cognizable civil claims even where their preferences conflict with those of their parents. See generally Catherine J. Ross, *From Vulnerability to Voice: Appointing Counsel for Children in Civil Litigation*, 64 FORDHAM L. REV. 1571 (1996) [hereinafter *From Vulnerability to Voice*] (setting forth an analytical model for appointment of counsel for minors in certain civil matters and reserving exploration of the precise subject matter of such civil claims).

gral right to receive information so that speakers can evaluate and choose among the ideas which they prefer to voice.⁶ Second, it builds on the doctrine that children possess constitutional rights, including rights under the First Amendment.⁷ Third, the argument draws on precedents that recognize that mature minors⁸ possess certain liberty interests independent of their parents.⁹

The thesis of this article is that minors possess autonomous liberty interests that cannot be exercised meaningfully without access to information conveying a variety of viewpoints. All too often, discussion about constitutional rights and children has focused on the complex relationship between the state and the family as a whole, minimizing the potential divisions within the family unit.¹⁰ Thus, a child and her parents may agree that neither wants the child to receive certain information from the state. The legal question is then framed as whether or not the state will accommodate that unified request by, for example, exempting the child from curricular requirements. In some instances, the state may deny accommodation because it has something important to communicate to all minors. In a second set of circumstances, parents and children may make a unified claim for the children to exercise speech rights that the state does not wish to grant. The posture in which the constitutional claims of parents and their children are uniformly aligned is, however, only one of a variety of plausible permutations.

⁶ See *infra* Part I.A.

⁷ See *infra* Part I.B.

⁸ The legal concept of a "mature minor" is discussed *infra* Part II. See *Bellotti v. Baird*, 443 U.S. 622, 642-44 (1979) (plurality opinion) (protecting the right of mature minors to bypass a law requiring parental consent before undergoing an abortion).

⁹ See *infra* Part I.C. Throughout this article, I use the term "parents" to include all individuals entrusted with the primary care of children. "Entrusted" is a carefully chosen term. I agree with other scholars who have observed that children are indeed different in many essential ways from adults. Children have "needs" in addition to needing rights. Children need positive relationships with nurturing adults. The well-being of infants in particular depend on the formation of such relationships. As they mature, children's lives are still largely defined by relationships as much as they are by autonomy. See MARTHA MINOW, *MAKING ALL THE DIFFERENCE: INCLUSION, EXCLUSION, AND AMERICAN LAW* 306 (1990); Barbara Bennett Woodhouse, *Hatching the Egg: A Child-Centered Perspective on Parent's Rights*, 14 CARDOZO L. REV. 1747, 1842 (1993).

¹⁰ See, e.g., Lesley E. Daigle, *Empowering Women to Protect: Improving Intervention with Victims of Domestic Violence in Cases of Child Abuse and Neglect: A Study of Travis County, Texas*, 7 TEX. J. WOMEN & L. 287, 305-07 (1998) (discussing the state's power to intervene in parent-child relationships); Katherine C. Pearson, *Cooperate or We'll Take Your Child: The Parents' Fictional Voluntary Separation Decision and a Proposal for Change*, 65 TENN. L. REV. 835, 843 n.44 (1998) (discussing whether state removal of children suspected of being abused violates parents' constitutional rights).

The situations in which the constitutional interests and claims of minors may differ from those of their parents have received much less scrutiny. When such differences arise, of course, the minor cannot formally assert any constitutional rights against parents. A child can only assert a claim to a constitutional right to receive information against the state. This article considers the set of circumstances that arise when a mature minor wants information that the state generally makes available, but the minor's parents object. No reported cases arise in this posture. The state—acting through such institutions as public schools and libraries—possesses what appear to be three choices in such a dispute. First, the state can expressly accommodate the parent's decision to deny the minor access to information. Second, the state can adopt a "neutral" stance, which would amount to accommodating parental preferences. Third, the state can recognize that the minor has a protected constitutional right to receive information under the Speech Clause¹¹ and make such information accessible to the minor on the same basis that it is available to others. I argue that, under certain limited circumstances, common presumptions should shift with the result that the third option (allowing minors access to information) would become the presumptive norm.

Part I of this article considers three jurisprudential building blocks that support a mature minor's right to receive information: (i) the role of the right to receive information within the framework of the Speech Clause; (ii) the general scope of the speech rights of minors pertinent to this discussion; and (iii) the existing constitutional vision of the maturation process and its relationship to emerging autonomy rights. Part II applies the mature minor's right to information in the context of other constitutionally recognized liberty interests including abortion, sexuality and contraception, and freedom of religious expression. Part III concludes with a brief discussion of the method by which the right to receive information might protect minors from gender discrimination.

¹¹ "Congress shall make no law . . . abridging the freedom of speech." U.S. CONST. amend. I.

I. THREE CORNERSTONES OF A MATURE MINOR'S RIGHT TO RECEIVE INFORMATION

A. *The First Amendment Right to Receive Information*

The Constitution protects the right to receive information and ideas.¹² The right to receive information is the logical corollary of the right to speak.¹³ This reasoning proceeds from Justice Holmes' classic dissent in *Abrams*, the first express judicial enunciation that the First Amendment promotes the marketplace of ideas.¹⁴ After all, what good is a marketplace that has only sellers but no buyers, whether of widgets or ideas?¹⁵ The right to receive information is also essential to the realization of liberty interests that emphasize individual self-realization and autonomy. Both the marketplace of ideas and the liberty model of the First Amendment are inseparable from the goal of democratic self-governance expressed through the Speech Clause.

The right to receive information was the express basis of the holding in *Stanley v. Georgia*.¹⁶ In *Stanley*, the Supreme Court overturned a statute criminalizing "mere private possession" of legally obscene material for personal use.¹⁷ The appellant, who had been convicted under the statute after the police found three obscene movies in his bedroom, argued,

¹² See *Stanley v. Georgia*, 394 U.S. 557, 564 (1969) (Marshall, J.) ("It is now well established that the Constitution protects the right to receive information and ideas.") (quoting *Martin v. City of Struthers*, 319 U.S. 141, 143 (1943)).

¹³ See *Miller v. California*, 413 U.S. 15, 44 (1973) (Douglas, J., dissenting) (noting that "the right to know is the corollary of the right to speak"); *Red Lion Broad. Co. v. FCC*, 395 U.S. 367, 390 (1969) ("It is the right of the public to receive suitable access to social, political, esthetic, moral and other ideas . . ." to "preserve an uninhibited marketplace of ideas in which truth will ultimately prevail."); *In re Syracuse Peace Council*, 2 F.C.C.R. 5043, 5057 (1987) (stating that the First Amendment gives the people the right to receive ideas that are "unfettered by government interference").

¹⁴ See *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting) ("[T]he best test of truth is the power of the thought to get itself accepted in the competition of the market.").

¹⁵ See *Lamont v. Postmaster Gen.*, 381 U.S. 301, 308 (1965) (Brennan, J., concurring) ("It would be a barren marketplace of ideas that had only sellers and no buyers.").

¹⁶ 394 U.S. 557 (1969).

¹⁷ *Stanley*, 394 U.S. at 559, 568. Material that meets the legal definition of obscenity is not protected under the First Amendment. See *Roth v. United States*, 354 U.S. 476, 485 (1957) (holding that "obscenity is not within the area of constitutionally protected speech"); see also *Sable Communications of California v. FCC*, 492 U.S. 115, 124 (1989) ("We have repeatedly held that the protection of the First Amendment does not extend to obscene speech."); *Miller v. California*, 413 U.S. 15, 23-24 (1973) (reaffirming that obscene material is not protected by the First Amendment).

among other things, that he possessed "the right to read . . . what he pleases."¹⁸ The Court agreed.¹⁹ Writing for the majority, Justice Marshall limited the question to whether "mere private possession of obscene material" could be made a crime, and concluded that it could not, based on the primacy of an individual's "fundamental" right "to read or observe what he pleases."²⁰ "This right to receive information and ideas," the majority emphasized, "is fundamental to our free society."²¹

The reasoning of the Supreme Court in a variety of other cases involving the Speech Clause also implicates the right to receive information; a majority of the Supreme Court has recognized this right in substantive *obiter dicta* more than once.²²

¹⁸ *Stanley*, 394 U.S. at 565.

¹⁹ Six Justices signed the majority opinion. The remaining three did not take exception to Justice Marshall's analysis of the individual's right to receive ideas. See *Stanley*, 394 U.S. at 568-69 (Black, J., concurring) (asserting that the protections of the Speech Clause are absolute); *id.* at 569-72 (Stewart, J., concurring) (arguing that the Court should not have reached the question raised under the First Amendment because the movies were seized in violation of the Fourth Amendment and therefore should not have been admitted at trial).

²⁰ *Stanley*, 394 U.S. at 568. The constitutional legitimacy of excepting obscene matter from the protection of the Speech Clause rests, Justice Marshall explained, on the dangers posed by distribution of such materials, such as the risk that they might reach children or "intrude upon" public sensibilities. *Id.* at 567. Where the adult recipient chooses the material, however, "no such dangers" exist to support governmental intrusion into the privacy of an "individual's mind" and home. *Id.* The argument in this article is confined to the right of minors to receive protected speech, that is, speech that is not legally obscene. For criticisms of the exclusion of "obscene" speech from the protection of the Speech Clause, see *Paris Adult Theater I v. Slaton*, 413 U.S. 49, 98-114 (1973) (Brennan, J., dissenting) (discussing the difficulties of separating obscene speech from other sexually oriented artistic speech); NADINE STROSSEN, *DEFENDING PORNOGRAPHY: FREE SPEECH, SEX, AND THE FIGHT FOR WOMEN'S RIGHTS* 56-59 (1995) (discussing how censorship of speech labeled obscene may intrude on political expression); Eric M. Freedman, *A Lot More Comes Into Focus When You Remove the Lens Cap: Why Proliferating New Communications Technologies Make it Particularly Urgent for the Supreme Court To Abandon its Inside-Out Approach To Freedom of Speech and Bring Obscenity, Fighting Words and Group Libel Within the First Amendment*, 81 IOWA L. REV. 883, 902-05 (1996) (exploring the contradictions between *Roth* and *Stanley*).

²¹ *Stanley*, 394 U.S. at 564 (holding that the right to receive ideas applies "regardless of their social worth").

²² The right to receive information was a major element in the Supreme Court's reasoning in *Reno v. ACLU*, in which the Court overturned the regulation of "indecent" Internet communication that did not meet the legal definition of obscenity. See 521 U.S. 844, 874 (1997). In order to protect minors, Justice Stevens wrote for the Court, the statute suppressed speech "that adults have a constitutional right to receive." *Id.*; see also, e.g., *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 783 (1978) (asserting that the role of the First Amendment includes protecting "the dissemination of information and ideas"); *Kleindienst v. Mandel*, 408 U.S. 753, 762-63 (1972) (Blackmun, J.) (noting that "[i]n a variety of contexts this Court has referred to a First Amendment right to 'receive information and ideas'" (quoting *Martin v. City of Struthers*, 319 U.S. 141, 143 (1943))); *Red Lion Broad. Co. v. FCC*, 395 U.S. 367 (1969) (holding that the First Amendment protects the right of the public to re-

In its 1965 decision in *Lamont v. Postmaster General*, for example, the Supreme Court overturned a postal regulation that required the addressees of foreign communist propaganda (in this instance, the *Peking Review*) to respond to notification from the post office indicating that they in fact wanted the mail delivered.²³ The majority opinion, authored by Justice Douglas, rested on what he called the "narrow ground" that the government may not impose an "affirmative obligation" on the recipient as a condition of receiving mail.²⁴ Justice Brennan's concurring opinion made explicit the premise left unarticulated by the majority: the First Amendment embraces the right to receive communications as well as to speak.²⁵

The concept of the right to receive information captured the approval of every Justice who participated in the Supreme Court's consideration of *Bolger v. Youngs Drug Products Corp.*,²⁶ even though the concept was not expressly before the Court in that case. This right sounds an implicit theme both in the majority opinion and in then-Associate Justice Rehnquist's concurrence.²⁷ The precise question before the Court in *Bolger* involved the right of a contraceptive manufacturer to mail to the public unsolicited pamphlets described as "informational" which concerned the availability of prophylactics generally and the prevention of sexually transmitted diseases.²⁸ The Court upheld the rights of the commercial speaker, holding that the importance of conveying "truthful

ceive a variety of viewpoints and information); *Lamont v. Postmaster Gen.*, 381 U.S. 301 (1965) (invalidating restrictions on mail delivery of "communist propaganda"); *Thomas v. Collins*, 323 U.S. 516, 534 (1945) (holding that laborers have a right to hear what union organizers wish to communicate); *Cf. Butler v. Michigan*, 352 U.S. 380, 383 (1957) (not expressly discussing the right to receive information, but holding that the state cannot reduce the adult population to "reading only what is fit for children").

²³ 381 U.S. 301 (1965).

²⁴ *Id.* at 307 (Douglas, J.). The Speech Clause does leave listeners free to decline information. See *Rowan v. United States Post Office Dep't*, 397 U.S. 728, 736-37 (1970) (upholding a statute which permits addressees to give notice that they do not wish to receive additional sexually explicit mailings).

²⁵ *Lamont*, 381 U.S. at 308-09 (Brennan, J., concurring) (citing *Martin v. Struthers*, 319 U.S. 141, 143 (1943)) (holding that the right to distribute literature "necessarily protects the right to receive it").

²⁶ 463 U.S. 60 (1983).

²⁷ *Id.* at 69 (Marshall, J., joined by Burger, C.J., and White, Blackmun, Powell, JJ.); *id.* at 76 (Rehnquist, J., concurring, joined by O'Connor, J.). Justice Brennan did not participate in *Bolger*, but would most likely have pursued the line of reasoning he began in *Lamont* and later continued in *Island Trees*. See *Board of Educ., Island Trees Union Free Sch. Dist. No. 26 v. Pico*, 457 U.S. 853 (1982); *Lamont*, 381 U.S. at 308; see also *supra* notes 15 and 71 and accompanying text referring to *Lamont* and *Island Trees*, respectively.

²⁸ *Bolger*, 463 U.S. at 66-67 n.13.

information relevant to important social issues" outweighed the government's asserted interests.²⁹ Justice Marshall's opinion for the Court examined the importance of the right of parents to receive information that might help them in carrying out some of their most difficult responsibilities, concluding that the statute prohibiting the unsolicited mailing of contraception advertisements was defective in part because it denied parents access to important information and in part because it denied teenagers access to critical knowledge.³⁰

Similarly, then-Associate Justice Rehnquist's concurrence, joined by Justice O'Connor, emphasized that although parents might be entitled to the government's support in limiting the kinds of materials that reached the family mailbox, as the government had argued in the case, the statute at issue inhibited the interests of parents because the law denied "parents access to information about birth control that might help them make informed decisions" about what to tell their children.³¹ Seven of the eight Justices who participated in the *Bolger* decision thus recognized a right to receive at least some types of information. The two remaining Justices on the Supreme Court at the time *Bolger* was decided—Justices Brennan and Stevens—have advocated a right to receive information elsewhere.³²

Despite its importance, the right to receive information remains a relatively unexplored aspect of freedom of speech even when adults assert such a claim.³³ A handful of Justices

²⁹ *Id.* at 69 (stating that "the First Amendment interest served by such speech [is] paramount").

³⁰ *Id.* at 74-75 n.30 (noting that "the statute also quite clearly denies information to minors, who are entitled to 'a significant measure of First Amendment protection'" (citing *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 212 (1975))).

³¹ *Bolger*, 463 U.S. 60, 79 (1983) (Rehnquist, J., concurring in judgment).

³² See *Houchins v. KQED, Inc.*, 438 U.S. 1, 30 (1978) (Stevens, J., dissenting) (noting "the First Amendment protects not only the dissemination but also the receipt of information and ideas") (citing *Island Trees*, 457 U.S. at 867-68 n.20 (Brennan, J., plurality opinion, joined by Stevens, J.)).

³³ Professor Barron observed in 1973 that the primacy of the listener is "a pioneering concept which is not yet fully developed or understood." JEROME A. BARRON, *FREEDOM OF THE PRESS FOR WHOM? THE RIGHT OF ACCESS TO MASS MEDIA* 145 (1973). With the exception of what Professor Thomas Emerson labeled a preliminary exploration of an emerging right, the right to receive information has not been the focus of much scholarly attention in the intervening years. See generally Thomas Emerson, *Legal Foundations of the Right to Know*, 1976 WASH. U. L.Q. 1 (1976). The right to receive information is discussed in William E. Lee, *The Supreme Court and the Right to Receive Expression*, 1987 SUP. CT. REV. 303 (arguing that the right to receive rests largely on the significance of the speaker's right to speak) and briefly in Note, *Content Regulation and the Dimensions of Free Expression*, 96 HARV. L. REV. 1854, 1863-64 & nn.52-57 (1983). The phrase does not appear in the title of any other article published in a major law review revealed by electronic search, nor is it deemed sufficiently important to appear in the indexes to the many important books on freedom

have clarified the significance of the right to receive information in separate opinions.³⁴ Lower courts have confirmed the centrality of the right to receive information within the structure of the First Amendment.³⁵ The subtextual status of the right to receive information may be attributable in part to the fact that it is frequently taken for granted and subsumed within the speaker's right to express his or her views. Normally, speakers pursue their own speech rights in court, and potential listeners do not become parties. Speakers who know what message they wish to deliver may well be more motivated to seek vindication of their rights than potential listeners, who may not know what message they are going to

of speech. Significant exceptions resting on the concept of the right to receive information—although not that exact phrase—include OWEN M. FISS, *LIBERALISM DIVIDED: FREEDOM OF SPEECH AND THE MANY USES OF STATE POWER* 13-30 (1996) (arguing that when courts scrutinize regulations of speech, they should focus on whether the regulation at issue enriches or impoverishes the universe of speech); MARTIN H. REDISH, *FREEDOM OF EXPRESSION: A CRITICAL ANALYSIS* 47 (1984) (stating that if self-realization is accorded central status within the Speech Clause, then "the individual needs an uninhibited flow of information and opinion to aid him or her in making life-affecting decisions, in governing his or her own life").

³⁴ See, e.g., *Board of Educ., Island Trees Free Sch. Dist. No. 26 v. Pico*, 457 U.S. 853 (1982) (discussed *infra* at text accompanying notes 57-66); *Houchins*, 438 U.S. at 30 (Stevens, J., dissenting); *FCC v. Pacifica Found.*, 438 U.S. 726, 764 (1978) (Brennan, J., dissenting) (arguing that the majority's decision to allow a ban on indecent radio speech in this instance ignores the "constitutionally protected interests of . . . those who desire to receive [such] broadcasts"); *Miller v. California*, 413 U.S. 15, 44 (1973) (Douglas, J., dissenting) (asserting, "the right to know is the corollary of the right to speak or publish"); *Kleindienst v. Mandel*, 408 U.S. 753, 775 (1972) (Marshall, J., dissenting) (holding that by barring a foreign speaker on the basis of his ideas, the government prevents U.S. citizens from exercising fundamental First Amendment rights because "[t]he freedom to speak and the freedom to hear are inseparable; they are two sides of the same coin"); *Ginsberg v. New York*, 390 U.S. 629, 649 (1968) (Stewart, J., concurring) (arguing that freedom of expression, the "free trade in ideas," involves not only the right to speak and publish but also the "liberty of each man to decide for himself what he will read and to what he will listen") (citing *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting)).

³⁵ Lower courts have also indicated the centrality of the right to receive ideas to the framework of the Speech Clause. See *Kreimer v. Bureau of Police*, 958 F.2d 1242, 1251 (3d Cir. 1992) (holding that a right to receive information applies to public libraries); *Fox v. Board of Trustees*, 841 F.2d 1207, 1211-12 (2d Cir. 1988) (applying the right to receive information to college students) *overruled on other grounds*, 492 U.S. 469 (1989); *Mainstream Loudon v. Board of Trustees*, 2 F. Supp. 2d 783, 792 (E.D. Va. 1998) (affirming that "the right to receive information is inherent in the right to speak") (internal citations omitted); *Mainstream Loudon v. Board of Trustees of the Loudon County Library*, 24 F. Supp. 2d 552 (E.D. Va. 1998) (granting summary judgment to plaintiffs in the same case); *Sheck v. Baileyville Sch. Comm.*, 530 F. Supp. 679, 685 (D. Me. 1982) (stating that book bans impermissibly restrict the "right to receive information and ideas, the indispensable reciprocal of any meaningful right of expression") (citing *Procurier v. Martinez*, 416 U.S. 396, 408 (1974)); *ACLU of Va. v. Radford College*, 315 F. Supp. 893, 896 (W.D. Va. 1970) (reasoning that the right to speak would have limited meaning if no one had the right to hear); *Smith v. University of Tenn.*, 300 F. Supp. 777, 780 (E.D. Tenn. 1969) (stating that the right of "free speech extends to listeners").

hear or how much they will value that message.

Where the rights of the speakers themselves are pure and undiminished, it is generally unnecessary for those who oppose regulation of speech to rest their arguments on the right to receive information.³⁶ Instead, the notion of a right to hear is more often invoked where courts have, in the past, limited speakers' rights under the Speech Clause. Such cases involve, for example, commercial speakers,³⁷ including the mass media,³⁸ whose ideas are deemed to have limited social worth,³⁹ or foreigners whose speech originates outside the United States.⁴⁰ The right to receive information may also be invoked in the service of unpopular claimants, as in the case of prisoners or the homeless.⁴¹

Minors are similarly disfavored in their quests to exercise constitutional rights. Where minors are concerned, the right

³⁶ Although the press occupies a position of primacy under the Speech Clause, in accordance with James Madison's insistence that only a well-informed public can sustain free debate and full democracy, the press's right of access to events rests in part on its role as agent of the public. Through its role as agent, the press serves as an instrument by which individuals exercise their right to receive information. See *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555 (1980).

³⁷ See *Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60 (1983) (applying the test for commercial speech); but see *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748, 762 (1976) (holding that commercial speech is not entirely without First Amendment protection); *Fox*, 841 F.2d at 1211-12 (upholding the right of university students to receive commercial speech); Martin Redish, *First Amendment Theory and the Demise of the Commercial Speech Distinction: The Case of the Smoking Controversy*, 24 N. KY. L. REV. 553, 553 (1997) (arguing against the distinction between non-commercial speech and truthful commercial speech on the grounds that both expand the marketplace of ideas).

³⁸ See generally *FCC v. Pacifica Found.*, 438 U.S. 726, 748 (1978) (finding that "[o]f all forms of communication, broadcasting has the most limited First Amendment protection"); *Red Lion Broad. Co. v. FCC*, 395 U.S. 367, 390 (1969) (stating that "it is the right of viewers and listeners, not the right of broadcasters, which is paramount" because of the unique attributes of broadcast communication); *Action for Children's Television v. FCC*, 58 F.3d 654, 668 (D.C. Cir. 1995) (asserting that broadcast media may be subject to more restrictive regulation than other types of media under the First Amendment); BARRON, *supra* note 33, at 319-343 (advocating greater public access to media); FISS, *supra* note 33, at 17-46 (critiquing various liberal responses to free speech controversies).

³⁹ See *Reno v. ACLU*, 521 U.S. 844, 874 (1997) (holding that the Communications Decency Act of 1996 was not narrowly tailored to achieve its expressed purpose of protecting the young from undefined, potentially harmful speech); *Stanley v. Georgia*, 394 U.S. 557, 558-564 (1969) (affirming the right to possess materials containing obscene speech in one's home).

⁴⁰ See *Lamont v. Postmaster Gen.*, 381 U.S. 301 (1965) (striking down on constitutional grounds a statute aimed only at speech labeled as foreign propaganda).

⁴¹ See *Procunier v. Martinez*, 416 U.S. 396, 398 (1974) (invalidating censorship of prison inmates' mail); *Kreimer v. Bureau of Police*, 958 F.2d 1242, 1255 (3d Cir. 1992) (upholding a homeless man's right of access to the town public library on the ground that the First Amendment includes a "positive right of public access to information," including access to "a public library, the quintessential locus of the receipt of information").

to speak and to receive information is widely perceived as being more limited than the corresponding rights of adults, as discussed in Part I.B.⁴² Where young persons assert rights to speech, and make related autonomy claims, the traditional limitations on the core rights of the young move the right to receive information to a central doctrinal position.⁴³

B. *The Scope of the Rights of Minors under the Speech Clause Briefly Considered*

The Supreme Court has accepted without question the notion that the state has a greater interest, and therefore broader authority, in regulating the access of minors to certain speech than with regard to adults.⁴⁴ The Supreme Court, however, has rejected state action that would make material entirely unavailable to minors regardless of the minors' own parents' preferences for openness.⁴⁵ The notion that parents may elect to make controversial materials available to their

⁴² *Carey v. Population Servs. Int'l*, 431 U.S. 678, 692 (1977) (asserting that the state's power to regulate children is greater than its power to regulate adults); *id.* at 705 (Powell, J., concurring) (arguing that the "States have broad latitude to regulate with respect to adolescents") (citing *Prince v. Massachusetts*, 321 U.S. 158 (1944)); *Erznoznick v. City of Jacksonville*, 422 U.S. 205, 214 n.11 (1975) (stating that the speech rights of minors are not co-extensive with those of adults, in part because minors lack full capacity for individual choice); *Ginsberg v. New York*, 390 U.S. 629 (1968) (holding that the state may use a "variable" concept of obscenity to shelter children from speech that would be constitutionally protected for adults).

⁴³ Many of the cases cited in *supra* notes 35 and 37 on the importance of the right to receive information involve claims by students, both under and over the age of majority. *E.g.*, *Fox v. Board of Trustees of the State Univ. of New York*, 841 F.2d 1207 (2d Cir. 1988) (university); *Sheck v. Baileyville Sch. Comm.*, 530 F. Supp. 2d 679 (D. Me. 1982) (high school); *ACLU of Va. v. Radford College*, 315 F. Supp. 893 (W.D. Va. 1970) (university); *Smith v. University of Tenn.*, 300 F. Supp. 777 (E.D. Tenn. 1969) (university). The Supreme Court of New Jersey found that a marketplace of ideas is central to the educational mission which "seeks to encourage both a wide and continuous exchange of opinions and ideas and to foster a policy of openness" *New Jersey v. Schmid*, 423 A.2d 615, 631 (N.J. 1980).

In a forthcoming article, I challenge the notion that the State has demonstrated a sufficiently compelling interest to justify the regulation of non-obscene, protected but controversial speech. See Catherine J. Ross, *Anything Goes: Examining the State's Interest in Protecting Children from Controversial Speech*, 53 VAND. L. REV. (forthcoming 2000).

⁴⁴ Commentators have challenged the assumption that children's substantive rights should not be co-extensive with the rights enjoyed by adults. See, e.g., Katherine Hunt Federle, *Children, Curfews, and the Constitution*, *supra* note 3, at 1340-68. Elsewhere, Professor Federle argues that power should be shifted to children. See Katherine Hunt Federle, *Rights Flow Downhill*, 2 INT'L J. CHILDREN'S RTS., 343, 363-68 (1994).

⁴⁵ See *Denver Area Educ. Tele-Communications Consortium, Inc. v. FCC*, 518 U.S. 727 (1996) (overturning a ban on indecent broadcasts); *Sable Communications of Cal., Inc. v. FCC*, 492 U.S. 115 (1989) (overturning a complete ban on "dial-a-porn" communications).

children when the state restricts direct access by minors has been a foundation of judicial reasoning in cases upholding state regulation of speech for the purpose of protecting children.⁴⁶ In *Ginsberg v. New York*, for example, the Supreme Court underscored that state regulation barring sale of so-called "girlie magazines" to minors did not have the effect of making the materials completely unavailable to minors.⁴⁷ To the contrary, parents remained free under the statute to buy "girlie magazines" for their children.⁴⁸ It is not, however, always practicable for parents to provide direct access to materials, even where the parents support the young person's efforts to obtain information.⁴⁹ Increasingly, the regulated materials may be far more expensive than a "girlie magazine,"⁵⁰ which may make the communication inaccessible for all practical purposes.

Schools and public libraries, for example, frequently refuse to allow young people unrestricted access to the Internet, and, in many instances, limit what adults, including parents, can see as well. Such policies violate the American Library Association Code of Ethics as well as the constitutional right to receive information.⁵¹ Understanding that "[e]thical dilem-

⁴⁶ See *Ginsberg v. New York*, 390 U.S. 629, 639 (1968) (holding that a state may limit the sale of adult magazines so long as those restrictions do not make the materials completely inaccessible).

⁴⁷ *Id.* (stating that parents have obligations to educate their children, and that the State can "neither supply nor hinder" those obligations).

⁴⁸ *Id.* (noting that the statute "recognizes the parental role in assessing sex-related materials").

⁴⁹ Readers of this journal are likely to take access to libraries and other resources as a given. But many individuals and families lack access to traditional materials such as books and magazines because no public library is available to them. John T. McQuiston, *In Search of Free Library Access for All: Panel Is on the Road, Asking Residents About Improving Services*, N.Y. TIMES, May 24, 1999, at B5 (noting that over one million residents of New York State lack free library privileges, and the majority of the elementary schools in the state have neither a "complete library" nor a librarian).

⁵⁰ The costs of Internet access, for example, include the cost of a computer or operating unit, a telephone line, and, in most instances, a monthly access charge. A recent government study shows a widening gap between rich and poor in Internet access. Children in single parent households and persons of color are much less likely than members of other groups to have access to computers and the Internet. NATIONAL TELECOMMUNICATIONS AND INFORMATION ADMINISTRATION, U.S. DEPARTMENT OF COMMERCE, *FALLING THROUGH THE NET: DEFINING THE DIGITAL DIVIDE* (July 1999).

⁵¹ Such policies would also violate the United Nations Convention on the Rights of the Child, if the United States subscribed to it. See Convention on the Rights of the Child, G.A. Res. 25 (XLIV), U.N. GAOR, 44th Sess., Supp. No. 49, U.N. Doc. A/44/25 (1989), reprinted in 28 I.L.M. 1448 (1989) [hereinafter *U.N. Convention*]. Every nation except for the United States and Somalia has ratified the U.N. Convention. See Cynthia Price Cohen & Susan Kilbourne, *Jurisprudence of the Committee on the Rights of the Child: A Guide for Research and Analysis*, 19 MICH. J. INT'L L. 633, 635 (1998). The U.N. Convention provides that each child shall have the "right to freedom of expression," including the "freedom to seek [and] receive . . . information and

mas occur when values are in conflict," professional librarians are "explicitly committed to intellectual freedom and the freedom of access to information."⁵² They specifically note the "special obligation" of libraries to "ensure the free flow of information and ideas to . . . future generations [i.e., children]."⁵³

High-minded principles are not always able to withstand public pressures. In Austin, Texas, for example, a state capital and university community, a controversy erupted in 1997 over the use of Internet filters in the public library.⁵⁴ A compromise was reached in which the library agreed to filter most of its computers for sex and nudity, but to provide four unfiltered computers for use only by adult patrons. Minors in Austin may not use the unfiltered computers, even if they have permission slips from their parents or if their parents accompany them.⁵⁵ This restriction is particularly significant since forty-five percent of Internet users depend on libraries for Internet access.⁵⁶ Even if every resident of the United States had Internet access at home, the premises of minors' rights to receive information make it imperative that libraries offering Internet services allow minors access to all legally available materials.⁵⁷

Imagine that a parent wants to use the Internet to help teach a teen about safe sex. The Austin library would require the parent to do the research alone and share it with the teen later, thus possibly leaving responsive questions unexplored.⁵⁸ To be sure, the state has no affirmative obligation to

ideas of all kinds . . . through any media of the child's choice." *U.N. Convention, supra*, at Art. 13.I.I.M. According to its proponents, the U.N. Convention contemplates a right to information "broader than children's speech rights [as presently] defined by the U.S. Supreme Court." Susan Kilbourne, *Opposition to U.S. Ratification of the United Nations Convention on the Rights of the Child: Responses to Parental Rights Arguments*, 4 LOY. POVERTY L.J. 55, 77 (1998).

⁵² American Library Association, *Code of Ethics* (adopted June 28, 1995) <<http://www.ala.org/alaorg/oif/ethics>> (pledging to promote "equitable access," resist censorship, and protect user privacy).

⁵³ *Id.* (elaborating on the pledge to promote "equitable access," resist censorship, and protect privacy of users).

⁵⁴ Katie Hafner, *Library Grapples With Internet Freedom*, N.Y. TIMES, Oct. 15, 1998, at G1 (detailing the conflict over Internet filters in the Austin, Texas public library).

⁵⁵ *Id.* (describing the requirements for the use of unfiltered computers).

⁵⁶ ACLU, *Censorship in a Box: Why Blocking Software is Wrong for Public Libraries*, (visited Jan. 22, 1999) <<http://www.aclu.org/issues/cyber/box.html>> (citing a Nielsen survey showing that 45% of Internet users rely on libraries for access).

⁵⁷ Pornography, like all material that meets the legal definition of obscenity, is outside the protection of the First Amendment and is subject to criminal regulation, as are communications from pedophiles intended to lure children to become victims of abuse. See *Reno v. ACLU*, 521 U.S. 844, 877 n.44 (1997).

⁵⁸ The fundamental rights of parents, discussed *supra* notes 46-48 and accompa-

make information available,⁵⁹ but where it does it must not engage in content or viewpoint discrimination as it does in the Austin public library.⁶⁰

Children possess rights under the Speech Clause.⁶¹ When Justice Fortas stated in *Tinker v. Des Moines School District* that children do not "shed their [First Amendment rights] at the schoolhouse gate," the majority made clear by implication that those same children possess First Amendment rights outside the school setting.⁶² The Court has declined to tackle the broader question of how to define the scope of children's First Amendment rights inside or outside of the schools. In the area of speech, as in other areas implicating constitutional rights, the Supreme Court has been "reluctant to attempt to define 'the totality of the relationship of the juvenile and the state.'"⁶³ Sidestepping the issue, the Justices have concluded that the question of the extent of the state's "power to regulate conduct of minors not constitutionally regulable when committed by adults is a vexing one, perhaps not susceptible of precise answer."⁶⁴ Even within the school, however, where the state has broad powers over minors,⁶⁵ *Tinker*

nying text, protect a parent's decision to provide a teenager with information about sex, even if the rest of the community protests that such information is inappropriate for a person of that age. See *id.* at 878.

⁵⁹ See *Board of Educ., Island Trees, Union Free Sch. Dist. No. 26 v. Pico*, 457 U.S. 853, 888 (1982) (Burger, C.J., dissenting) ("[t]he right to receive information and ideas' . . . does not carry . . . the concomitant right to have those ideas affirmatively provided at a particular place by the government") (quoting *Stanley v. Georgia*, 394 U.S. 577, 564 (1969)); cf. *Fiss*, *supra* note 33, 19-20 (arguing that the state has an affirmative obligation to enhance speech).

⁶⁰ See *Mainstream Loudon v. Board of Trustees*, 24 F. Supp. 2d 522, 570 (E.D. Va. 1998) (holding that if a public library offers Internet access, any restriction based on content must be narrowly tailored to serve a compelling government interest); *Police Dep't of Chicago v. Mosley*, 408 U.S. 92, 95 (1972) (holding that the government may not single out one subject or viewpoint for regulation in a public place); *Milwaukee Soc. Democratic Publ'g Co. v. Burleson*, 255 U.S. 407, 437 (1921) (Holmes, J., dissenting) (stating that the government does not have to run a post office, but as long as it does so the constraints of the First Amendment apply).

⁶¹ See *Erznoznick v. City of Jacksonville*, 422 U.S. 205, 213-214 (1975) (citing *Tinker v. Des Moines Sch. Dist.*, 393 U.S. 503 (1969)) (asserting that "minors are entitled to a significant measure of First Amendment protection").

⁶² 393 U.S. 503 (1969) (affirming that students have the right to exercise non-disruptive political speech at school by wearing black armbands to protest the war in Vietnam).

⁶³ *Carey v. Population Servs. Int'l*, 431 U.S. 678, 692 (Brennan, J., plurality opinion) (quoting *In re Gault*, 387 U.S. 1, 13 (1967)).

⁶⁴ *Id.* (discussing the State's power to regulate the conduct of minors).

⁶⁵ See *Vernonia School Dist. 47J v. Acton*, 515 U.S. 646, 654-57 (1995) (asserting that the rights of students are limited because they are in the custodial care of the school); *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 266 (1988) (reaffirming that the speech rights of students must be considered "in light of the special characteristics of the school environment") (citation omitted); *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 681 (1986) (emphasizing school authority to impose civility).

underscored that "students may not be regarded as closed-circuit recipients of only that which the [s]tate chooses to communicate."⁶⁶ This much should have been clear since the Supreme Court explained so eloquently in *West Virginia Board of Education v. Barnette* that the role of schools in "educating the young for citizenship is reason for scrupulous protection of Constitutional freedoms of the individual, if we are not to strangle the free mind at its source and teach youth to discount important principles of our government as mere platitudes."⁶⁷

The pivotal role of the right to receive information when evaluating presumptively truncated rights of minors was clear in the flurry of opinions issued in *Board of Education, Island Trees Union Free School District No. 26 v. Pico*.⁶⁸ Writing for a plurality of four, Justice Brennan expressly applied the right to receive information to minors.⁶⁹ His opinion is frequently cited to stand for the proposition that authorities do not have unfettered discretion to remove books from school libraries.⁷⁰

Justice Brennan relied heavily on the Supreme Court's long history of holdings that the right to receive information

⁶⁶ *Tinker*, 393 U.S. at 511 (stating that the state cannot monopolize the flow of information to students).

⁶⁷ *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 637 (1943).

⁶⁸ *Board of Educ., Island Trees Union Free Sch. Dist. No. 26 v. Pico*, 457 U.S. 853 (1982). The Justices issued seven separate opinions. *Id.*

⁶⁹ *Id.* at 867, 872.

⁷⁰ See, e.g., *Monteiro v. Tempe Union High Sch. Dist.*, 158 F.3d 1022, 1027 n.5 (9th Cir. 1998) (stating that *Island Trees* "held that a school board could not remove books from a school library" if its motives were suspect without violating students' right to receive information); *Mainstream Loudon v. Board of Trustees*, 2 F. Supp. 2d 783, 792-94 (E.D. Va. 1998) (the *Island Trees* plurality opinion stands for the proposition that school boards cannot remove library books just because they disagree with them, but could do so based on a concept such as "educational suitability"); *Virgil v. School Bd. of Colum. County*, 677 F. Supp. 1547, 1550 (M.D. Fla. 1988) (stating that *Island Trees* held that removal of books from the school library violated the students' right to receive information); see also, e.g., Stanley Ingber, *Socialization, Indoctrination, or the "Pall of Orthodoxy": Value Training in the Public Schools*, 1987 U. ILL. L. REV. 15, 52-78 (1987) (discussing *Island Trees*'s relevance in limiting the authority of schools to inculcate community values in minors); Glenn Kubota, Comment, *Public School Usage of Internet Filtering Software: Book Banning Reincarnated?*, 17 LOY. L.A. ENT. L. J. 687, 707-10 (1997) (arguing that while only a plurality in *Island Trees* emphasized the student's right to receive information, the 'holding' found ad hoc removal of books from a school library on the basis of the ideas contained therein unconstitutional).

Notwithstanding the use that both scholars and lower courts have made of *Island Trees*, I recognize that the holding is limited to a remand for development of the facts because summary judgment was granted erroneously. See *Island Trees*, 457 U.S. at 883-84 (White, J., concurring) (arguing that a material issue of fact precluded summary judgment below); *Mainstream Loudon*, 2 F. Supp. 2d at 792 (stating that in *Island Trees*, a sharply divided court remanded for a factual determination of the school board's motives).

"is an inherent corollary of the rights of free speech."⁷¹ The right, he explained, "follows ineluctably from the sender's First Amendment right to send" ideas.⁷²

The right has a second source as well. It stems directly from the liberty claims of the listeners. "[T]he right to receive ideas is a necessary predicate to the recipient's meaningful exercise of his own rights of speech, press, and political freedom."⁷³ Without reservation, the plurality applied the right of minors to receive ideas as represented by the students who had challenged the book removals.⁷⁴ The plurality maintained that allowing access to ideas in a school library was an important aspect of preparing students "for active and effective participation in the pluralistic, often contentious society in which they will soon be adult members."⁷⁵ Justice Brennan relied on a line of precedents beginning with *Barnette* for the principle that, although schools have a duty to inculcate values, they may not impose orthodoxy in matters of opinion.⁷⁶ The Supreme Court remanded the *Island Trees* case for a hearing into the school board's motives for denying students access to books that a citizens' group argued were "anti-

⁷¹ *Island Trees*, 457 U.S. at 867 (stating the basis for minors' rights to receive information).

⁷² *Id.* (emphasis in original) (describing the constitutional basis for the right to receive information).

⁷³ *Id.*

⁷⁴ *Id.* at 868 (noting "students too are beneficiaries of this principle"). Justice Blackmun, who joined in the plurality opinion, did not participate in Part II.A.1, which discussed the right to receive information. See *id.* at 878-79 (Blackmun, J., concurring) (arguing that the state may not "discriminat[e] between ideas" because school officials disapprove of the idea for political reasons). Other judicial opinions in the case did not disagree with the notion that the Constitution includes a right to receive ideas, or that such a right might apply to minors in certain circumstances, but differed with the manner in which the plurality applied these theories. See *id.* at 887 (Burger, C.J., dissenting) (acknowledging a right to receive ideas but denying what he viewed as the plurality's assertion that the right imposes an affirmative obligation on the school board to make ideas available). Earlier Supreme Court decisions also expressly contemplate that the right to receive information applies to minors, noting that the right to receive information is "nowhere more vital" than in schools. *Kleindienst v. Mandel*, 408 U.S. 753, 763 (1972) (citing *Shelton v. Tucker*, 364 U.S. 479, 487 (1960)); *Epperson v. Arkansas*, 393 U.S. 97 (1968); *Keyishian v. Board of Regents*, 385 U.S. 589, 603 (1967); *Sweezy v. New Hampshire*, 354 U.S. 234, 250 (1957) (plurality opinion). But see *Island Trees*, 457 U.S. at 915 (Rehnquist, J., dissenting) (arguing that the recognized right to receive ideas does not apply to school libraries).

⁷⁵ *Island Trees*, 457 U.S. at 868. See also *id.* at 869 (asserting that the library offers "a place to test or expand upon ideas presented" by others) (quoting *Right to Read Defense Comm. v. School Comm.*, 454 F. Supp. 703, 715 (D. Mass. 1978)).

⁷⁶ *Island Trees*, 457 U.S. at 870, 872 (citing *West Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943)); see also *id.* at 879 (Blackmun, J., concurring) (asserting that schools may not "strangle the free mind at its source and teach youth to discount important principles of our government as mere platitudes.") (quoting *Barnette*, 319 U.S. at 637).

American, anti-Christian, anti-Sem[i]tic [sic], and just plain filthy."⁷⁷

In *Island Trees*, as in every similar case involving the Speech Clause that has reached a federal appellate court, parents and their children presented mutual liberty claims.⁷⁸ I am unaware of a reported case from any court in which minors and their parents advocated different positions with regard to speech rights. Cases that have reached the Supreme Court about the First Amendment rights of minors involve fact situations in which the parents' and children's interests were aligned—parents were arguing that their children possessed speech rights in situations where children and parents shared a belief system. But common sense and experience suggest that parents and children cannot share the same views on matters touching the essence of belief systems without exception.⁷⁹

The Supreme Court has never squarely considered the civil liberties of children whose claims conflicted with the beliefs and preferences of their parents. Variations to the facts in some of the leading cases that involved merged claims of parents and children, such as *Wisconsin v. Yoder*,⁸⁰ suggest the

⁷⁷ *Id.* at 853.

⁷⁸ See *Tinker v. Des Moines Indep. Community Sch. Dist.*, 393 U.S. 503, 516 (1989) (Black, J., dissenting) (emphasizing that the speech at issue appeared to emanate as much from the parents' views as from the children's); *Wisconsin v. Yoder*, 406 U.S. 205, 243 (1972) (Douglas, J., dissenting) (the issue of conflicts between parents and children regarding exercise of First Amendment rights has never before been squarely before the Court); see also *Davis v. Page*, 385 F. Supp. 395, 398 (D. N.H. 1974) (elementary school-aged "children's asserted freedom of exercise of religion is, in essence, that of their parents.").

⁷⁹ Throughout this article, my argument assumes that where more than one parent is involved in a minor's life, those parents share the same value system and are trying to enforce the same rules about the accessibility of ideas. Surely this is no more realistic as a universal expectation than the assurance that children always agree with their parents. The problems raised when the parents are divided is, however, beyond the scope of my current inquiry. See, e.g., Ira C. Lupu, *Mediating Institutions: Beyond the Public/Private Distinction: The Separation of Powers and the Protection of Children*, 61 U. CHI. L. REV. 1317 (1994) (arguing that differences of opinion among parents help to protect the rights of children).

⁸⁰ *Yoder*, 406 U.S. 205 (1972). For a discussion of the impact of Justice Douglas' dissenting opinion on advocates for children's rights, see Emily Buss, *What Does Frieda Yoder Believe?*, 2 U. PA. J. CONST. L. 40, 40-41, 50-52 (1999) (arguing that minors should not be placed in a position that forces them to contradict their parents in court).

Modest variations to other leading cases also underscore the significance of the assumption that children and parents seek the same results under law. See, e.g., *Pierce v. Society of Sisters*, 268 U.S. 510 (1925) (holding that the liberty interests of parents allow them to choose whether to send their children to public or private schools, including parochial schools); *Meyer v. Nebraska*, 262 U.S. 390 (1923) (holding that the state cannot prohibit the teaching of a legitimate subject that parents desire their children to study). But see *Prince v. Massachusetts*, 321 U.S. 158 (1944) (stating that freedom of religion does not protect a guardian who allows a

problem which is central to my argument.

In *Yoder*, Amish parents won a religious exemption from compulsory school laws that would have required their children to attend school beyond the eighth grade. The Amish parents argued that high school attendance violated their religious beliefs and endangered their community's way of life.⁸¹ Under very narrow conditions, arguably unique to the Amish, the Supreme Court held that the interests of the Amish parents in directing their children's upbringing outweighed the state's interests in compulsory education.⁸² The Supreme Court emphasized, however, that its holding in no way addressed any potential independent interests that Amish teenagers might have in continuing their education.⁸³

In a partial dissent frequently cited by children's rights advocates, Justice Douglas argued that a decision as momentous as quitting school must reflect the free exercise claims of both the parents and their teenage children.⁸⁴ Justice Douglas argued that the Supreme Court could not impute the parents' beliefs to the children who had not testified. The state, according to Justice Douglas, could not permissibly "impose the parents' notions of religious duty upon their children," even if the parents could do so without the state's assistance.⁸⁵ Therefore, Justice Douglas dissented from the holding insofar as it applied to the two remaining Amish

child to help her distribute religious materials in violation of child labor laws). In *Meyer* and *Pierce*, the Court would have had to consider the children's rights independently from their parents' rights if the children supported the state's regulations regarding the acceptable parameters and sites of compulsory education. A similar situation would have arisen if Betty, the child in *Prince* who shared her guardian's religious faith, wanted to proselytize over the objections of her family. See *Prince*, 321 U.S. at 171-76 (Murphy, J., dissenting) (arguing that the Court should respect Betty's belief that she will burn in Armageddon for all eternity if she does not proselytize for her religion).

⁸¹ *Yoder*, 406 U.S. at 208-09.

⁸² *Id.* at 224-35 (emphasizing that the Amish had an established record of training their children and providing them with employment in their own community).

⁸³ *Id.* at 230-31 & n.21 (expressly noting that the children were not parties to the litigation, the case is not being tried on the theory that children were being prevented from attending school against their express desires, the one child who testified affirmed that her wishes corresponded to those of her parents, and it was the parents who were subject to prosecution for failing to send their children to school); *id.* at 237 (Stewart, J., concurring) (arguing that the case does not present "any questions regarding the right[s] of the children of Amish parents" because there is no suggestion that any of the children before the court differed in religious beliefs from their parents).

⁸⁴ *Id.* at 241-42 (Douglas, J., dissenting in part) ("Where the child is mature enough to express potentially conflicting desires, it would be an invasion of the child's rights to permit such an imposition without canvassing his views.").

⁸⁵ *Id.* at 242 (arguing that the State imposes on a child's liberty interests where it enforces adherence to the parents' religious beliefs without at least "canvassing" the child's own views).

teenagers who did not testify at trial: Vernon Yutzy and Barbara Miller. These young people, he insisted, "persons within the meaning of the Bill of Rights" needed to be heard before their parents' beliefs could cut off their choices about their own futures by truncating their education.⁸⁵ The implications of the right to receive information as applied to minors in this kind of case are discussed *infra* in Part II.C.

While the concerns that Justice Douglas voiced about Barbara and Vernon may not arise very often, they capture a real and poignant pattern in the lives of strictly religious families.⁸⁷ In her novel, *The Romance Reader*, Pearl Abraham describes the coming of age of Rachel, the daughter of a Hasidic rabbi, who lives in an isolated community where diversity is limited to different sects of strictly observant Jews.⁸⁸ Rachel attends a parochial school for Hasidic girls. Her parents forbid her from reading any books written in English.⁸⁹ Still, Rachel pines after English-language novels, through which she hopes to learn about "regular life."⁹⁰ At age 12, she wishes to have a library card.⁹¹ The effort to obtain classics like *Jane Eyre*, *Little Women* and *Johnny Tremaine* feels as treacherous and shameful to Rachel as the search for illicit drugs might be to others: "I think the whole world is looking at me and knows exactly where I'm going," Rachel recalls, describing her first trip to the library.⁹² "On the bus, I can't decide whether to get off in front of the library or a block away . . . I'm afraid to sit there reading, afraid someone will see me."⁹³ When Rachel's father complains that Rachel went

⁸⁵ *Id.* at 242-43 (asserting that *Yoder* is the first case to squarely present a potential division between the liberty claims of parents and their children).

⁸⁷ I am unaware of any estimates regarding how many young people find themselves in this predicament, but the numbers may be significant, especially in parts of the country where young people depend on adults to drive them to places that are inaccessible by public transportation.

⁸⁸ PEARL ABRAHAM, *THE ROMANCE READER* (1995). Hasidism is a pietistic movement that originated in Eastern Europe in the eighteenth century. It emphasizes traditional Jewish values and practices, and is distinguished by devotion to the Hasidic sub-group's spiritual leader. See DEBRA RENEE KAUFMAN, *RACHEL'S DAUGHTERS: NEWLY ORTHODOX JEWISH WOMEN* 176 nn.2-3 (1991). Like other branches of strict Orthodox Judaism, its values and social structure are uncompromisingly patriarchal. See *id.* at 2-3 and *passim*.

⁸⁹ The lack of access to information is not uncommon in traditionalist enclaves regardless of religious persuasion. See, e.g., Timothy Egan, *The Persistence of Polygamy*, N.Y. TIMES MAG. Feb. 28, 1999, at 51, 55 (noting the experience of Laura Chapman, home schooled after age eleven by a plural marriage family that considered itself part of a Mormon fundamentalist community, who asserted, "When I finally got out, at age 28, I had the knowledge of the outside world of an 11-year-old").

⁹⁰ ABRAHAM, *supra* note 88, at 35.

⁹¹ *Id.* at 31.

⁹² *Id.*

⁹³ *Id.*

to the library without permission, the librarian sends Rachel home. "If I tell her the truth," Rachel wonders, "will she help me? Adopt me?"⁹⁴ Ultimately, as the novel's title suggests, Rachel succeeds in getting her library card.⁹⁵ For Rachel, books do open a door to the world.⁹⁶

C. Maturing Autonomy Rights Unavoidably Conflict with the Constitutional Norm of Parental Control

Rachel's initial eviction from the public library resulted from the librarian's intuitive application of the frequently repeated *obiter dictum* that "the custody, care and nurture of the child reside first in the parents."⁹⁷ This principle dominates the legal discussion of the relationship between family privacy and the inculcation of parental values.⁹⁸ Except in instances of gross negligence and abuse,⁹⁹ at least in theory, the state does not interfere with parental decisions about childrearing, including decisions about which cultural norms they choose to emphasize,¹⁰⁰ nor should it in a pluralistic so-

⁹⁴ *Id.* at 33.

⁹⁵ *Id.* at 39-40. Rachel plots to steal a paid utility bill from her father's study to establish residency, but the only time she can get access to the room is on the Sabbath, when exertion is forbidden: "I don't know which is worse, going to the library or stealing and breaking the law of Shabbat [sic], but I know what the prophet's talking about when he says one sin begets another." *Id.* at 40.

⁹⁶ *See id.* at 50.

⁹⁷ *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944). The parental zone of privacy includes the right to choose which form of education the family will use to fulfill the state's compulsory education requirements. *See Pierce v. Society of Sisters*, 268 U.S. 510 (1925) (holding that the requirement that all children between eight and sixteen attend public schools unconstitutionally interfered with parents' right to direct the education of their children).

⁹⁸ *See Parham v. J. R.*, 442 U.S. 584, 621 (1979) (Stewart J., concurring) (asserting it is "a canon of the common law that parents speak for their minor children"); *Prince*, 321 U.S. at 166, *quoted in Stanley v. Illinois*, 405 U.S. 645, 651 (1972); *see also Bellotti v. Baird*, 443 U.S. 622, 638 (1979) (plurality opinion) (noting that in our nation's history and tradition, parents have substantive authority over their children); *Wisconsin v. Yoder*, 406 U.S. 205, 232 (1972) (holding that the "primary role of parents in the upbringing of their children is now established beyond debate as an enduring American tradition"). *See generally*, Ross, *supra* note 5, at 1586-87; Barbara Bennett Woodhouse, *Who Owns The Child?: Meyer and Pierce And The Child As Property*, 33 WM. & MARY L. REV. 995 (1992) (discussing the importance of the values of patriarchy in those two foundation cases).

⁹⁹ Protection of children in such instances is provided under statute, not based on constitutional rights. The Supreme Court has rejected a claim that children and their guardians have a cause of action based on the state's failure to protect them in their homes. *See DeShaney v. Winnebago County Dep't of Soc. Servs.*, 489 U.S. 189 (1989) (holding that the county had no duty under the Due Process Clause to protect the boy against an abusive father's violence); *see also Aviam Solfer, Moral Ambition, Formalism, and the "Free World" of DeShaney*, 57 GEO. WASH. L. REV. 1513 (1989) (discussing and criticizing Chief Justice Rehnquist's majority opinion).

¹⁰⁰ *Cf. Moore v. City of East Cleveland*, 431 U.S. 494 (1977) (protecting extended

ciety. Conflicts between parents and the state over the inculcation of values bring the inherent tension between pluralism and homogeneity to the forefront. The fears that Rachel's father harbors about the risks involved in her exposure to secular literature are well founded. It is essential to his belief system and community that Rachel remain in his particularized world when she grows up, just as it is important to the Amish and other distinctive communities that their offspring remain within the group. To Rachel's father, it may seem that the ability to preserve the heritage that he and Rachel share is a prerequisite for even circumscribed participation in the broader society.

Although parents enjoy substantial control over their children's access to information, the First Amendment requires a distinction between familial and public efforts to restrict the flow of information to young people. When a conflict between parents and children arises, it is frequently unclear whether the state should reinforce the parents' position, remain neutral, or even facilitate the minor's efforts. The answer to the dilemma depends on the nature of the conflict, the maturity of the child, and the stakes. Any public efforts to enforce parental restrictions on a mature minor's effort to receive speech involve state action. My argument suggests that where certain conditions are satisfied, state restrictions in service of parental censorship violate a minor's individual right to knowledge.

1. *Privately Enforced Restrictions on the Flow of Information to Minors*

Minors have no constitutional rights inside their parents' homes vis-à-vis their parents, at least in part because their parents are not state actors.¹⁰¹ At home, minors possess neither freedom of speech nor its reciprocal right, the right to receive information, unless their parents choose to grant them such privileges.¹⁰² The right proposed here would pre-

family members' rights to live together).

¹⁰¹ For example, while parents may force their children to observe the family's faith, the state may not do so directly. See *Yoder*, 406 U.S. at 242 (Douglas, J., dissenting) (considering whether the state may be able to override the parents' objections if an Amish child desires to attend high school); see also *Nunez v. City of San Diego*, 114 F.3d 935, 944-45 (9th Cir. 1997) (distinguishing between state-imposed and parentally-imposed curfews).

¹⁰² Consistent with the argument set forth here, parents may require their unemancipated minor children to worship with them and may impose a bedtime and a curfew. See John E. Coons et al., *Puzzling Over Children's Rights*, 1991 BYU L. REV. 307, 343-47 (observing that children can be forced to attend the church or school of their parents' choice).

sumably arise primarily in the context of libraries and other governmental activities designed to promote the marketplace of ideas.¹⁰³ Ideally, the right would help to establish norms of behavior that would only rarely need enforcement through litigation.¹⁰⁴

There is of course a distinction between limiting the ideas to which a preschooler is exposed and limiting those that reach an adolescent. Parental efforts to limit the latter may be doomed to failure, except where families have structured their lives to avoid interaction with pervasive popular culture. The law recognizes that maturation is a gradual process, so specific autonomy claims gain credibility in relation to the youngster's capacities.¹⁰⁵ Regardless of the child's age, parents possess impressive sources of power that they can use to impose their codes of behavior on children who live at home, including the minor's emotional and financial dependency.¹⁰⁶ In the most extreme cases, minors who challenge parental authority may find themselves committed to psychiatric hospitals,¹⁰⁷ committed to state institutions as incorrigible,¹⁰⁸ or

¹⁰³ This discussion focuses on the right to receive information that is already circulating in the general marketplace of ideas, as distinguished from the effort to gain access to ideas that the speaker has not agreed to release. *See generally*, *Schuloff v. Fields*, 950 F. Supp. 66 (E.D.N.Y. 1997) (denying an adoptee access to adoption records because the right to receive ideas does not allow the prospective recipient to compel a speaker to provide information). *But see* Naomi Cahn & Jana Singer, *Adoption, Identity, and the Constitution: The Case for Opening Closed Records*, 2 U. PA. J. CONST. L. 113, 113-143 (1999) (arguing that adoptees should have a right to information about their biological families); Thomas I. Emerson, *The First Amendment And The Right to Know*, 1976 WASH. U. L.Q. 1, 13-17 (1977) (discussing the importance of laws requiring disclosure of government data in the context of the right to know as an element of a functioning democracy).

¹⁰⁴ *Cf.* *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 523 (1993) (Kennedy, J.) (asserting that "[t]he principle that government may not enact laws that suppress religious belief or practice is so well understood that few violations are recorded in our opinions").

¹⁰⁵ *See* Emily Buss, *Confronting Developmental Barriers to the Empowerment of Child Clients*, 84 CORNELL L. REV. 895 (1999) (asserting that the development of capacity defies the bright lines favored by the law).

¹⁰⁶ *See* *Ohio v. Akron Ctr. For Reprod. Health*, 497 U.S. 502, 526 (1990) (Blackmun, J., dissenting) (stating that because of a minor's emotional vulnerability and financial dependency, "a parental notice statute is tantamount to a parental consent requirement"); *H.L. v. Matheson*, 450 U.S. 398, 438-39 & n.24 (1981) (Marshall, J., dissenting) (addressing the case of a minor who expected family conflict over the abortion decision, and who believed that she should be able to proceed with an abortion without notifying her parents in violation of a Utah statute); Ross, *supra* note 5, at 1594.

¹⁰⁷ *See* Ross, *supra* note 5, at 1580-82 (discussing abuse of parental control over "voluntary" psychiatric commitment).

¹⁰⁸ *See, e.g., In re Andrew R.*, 454 N.Y.S.2d 820 (Fam. Ct. 1982) (finding that Andrew's commitment to a treatment center for seven months based solely on his parents' petition violated his fundamental liberty interest in the absence of review by a neutral factfinder).

even forced out onto the streets.¹⁰⁹ Such possibilities diminish the likelihood that large numbers of minors will challenge parental authority publicly by claiming the rights urged here.

According to the psychological sciences, looking outward and testing parental premises are an essential aspect of maturation during the teenage years.¹¹⁰ Many theories of adolescent development emphasize that a successful resolution to adolescence and the maturation process includes, among other things, separation from the parents and development of a sexual identity and a personal moral values system, followed by an ability to return to the parental circle based on a position of relative equality as a young adult.¹¹¹ These stages of development are consistent with, and frequently mirror, the types of normative autonomy claims at issue in legal debates about the scope of rights for minors.

The concept of gradually emerging autonomy is reflected in our jurisprudence as well as in social science literature. It is closely associated with the notion of the teenager's own enhanced capacities and diminishing vulnerabilities. The chronological age of the minor is a significant, though not a determinative, factor.¹¹² No precise chronology provides a bright line indicating when specific autonomy rights ripen.¹¹³ A bright line case might arise in the unlikely event that a sheltered girl who will turn eighteen the day before an election were denied access to political literature which she needed to become an informed voter. Usually, the margins of maturity are murkier.

In *Bellotti v. Baird* the Supreme Court laid out three factors that have traditionally been used to justify distinguishing the rights of minors from those of adults: (i) the "peculiar vulnerability" of children; (ii) their presumed "inability to make critical decisions in an informed, mature manner"; and

¹⁰⁹ See Gregory A. Loken, "Thrownaway" Children and Throwaway Parenthood, 68 TEMP. L. REV. 1715 (1995); see also Carol Sanger & Eleanor Willemssen, *Minor Changes: Emancipating Children in Modern Times*, 25 U. MICH. J. L. REFORM 239, 277-83 (1992) (discussing the abandonment or neglect of teenagers).

¹¹⁰ This view may come as a shock to those who lament the negative influence of television, music, film, and video games on young people.

¹¹¹ See JOHN E. SCHOWALTER, M.D. & WALTER R. ANYAN, M.D., *THE FAMILY HANDBOOK OF ADOLESCENCE* 302-03 (1979) (describing The Group for the Advancement of Psychiatry's six criteria to be used to determine the resolution of adolescence).

¹¹² See *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 214 n.11 (1975) (discussing how age is a significant factor in deciding "whether a minor has the requisite capacity for individual choice") (quoting *Tinker v. Des Moines Sch. Dist.*, 393 U.S. 503, 513 (1969)); see also *Peck v. Upshur County Bd. of Educ.*, 155 F.3d 274, 287-88 (4th Cir. 1998) (anticipating that the Supreme Court would distinguish young elementary school students from older children in terms of their ability to distinguish private religious speech from government speech).

¹¹³ See *Planned Parenthood of Cent. Mo. v. Danforth*, 428 U.S. 52, 74 (1976).

(iii) the significance of the "parental role in child rearing."¹¹⁴ The Supreme Court explained that "mature minors" possess greater rights under the Constitution than their immature counterparts, but did not spell out how to determine whether an individual minor should be deemed "mature."¹¹⁵

Lower courts have struggled to define maturity in minors, generally relying on *ad hoc*, subjective evaluations.¹¹⁶ Presumably, the less an adolescent appears peculiarly vulnerable, and the more the adolescent displays a capacity to make informed, critical decisions, the more he or she satisfies the definition of a "mature minor." The second factor, the capacity to incorporate and analyze information, is central to the claim to a right to receive ideas, because the very search for knowledge suggests that a person understands the importance of becoming informed and intends to use information to make rational choices.

2. State Enforcement of Parental Limitations on Access to Information

As children grow older, most families share the job of education with schools,¹¹⁷ which work to inculcate "fundamental values necessary to the maintenance of a democratic political

¹¹⁴ See *Bellotti v. Baird*, 443 U.S. 622, 634 (1979) (plurality opinion).

¹¹⁵ See *id.* at 640-43 (holding that mature minors have a constitutional right to obtain abortions without parental consent under certain circumstances, but providing no guidance to the lower courts about how to ascertain maturity, resulting in an *ad hoc* application of the concept). But see *In re Doe*, 866 P.2d 1069, 1074 (Kan. Ct. App. 1994). In *In re Doe*, the court held that in the absence of a definition of the meaning of "mature and well-informed" under *Bellotti*, a minor need not be "extraordinarily mature" to be deemed mature under state law. Rather the minor should meet a working definition of having "the intellectual capacity, experience, and knowledge necessary to substantially understand the situation at hand and the consequences of the choices that can be made." *Id.*

¹¹⁶ See, e.g., *In re Jane Doe I*, 566 N.E.2d 1181, 1185 (Ohio 1990) (Moyer, C.J., dissenting) (stating that the state's highest court has a responsibility to define "maturity" in minors to assist trial courts in exercising their discretion). Factors used by lower courts include the ability to comprehend the significance and consequences of choices, age, work experience, living experience, intelligence, responsibility and freedom from undue influence. See, e.g., *In re Anonymous*, 558 N.W.2d 784, 787-88 (Neb. 1997); *In re Jane Doe I*, 566 N.E.2d at 1184; *H.B. v. Wilkinson*, 639 F. Supp. 952, 952-54 (D. Utah 1986); *In re Doe*, 866 P.2d at 1073-74.

¹¹⁷ A growing number of families do not share the job of education with schools. Home schooling has become increasingly common during the last decade. Since 1993, home schooling has been legal in all fifty states and current estimates suggest that approximately 1.5 million children are being educated at home by a parent. See Barbara Kantrowitz & Pat Wingert, *Learning At Home: Does It Pass the Test?*, NEWSWEEK, Oct. 5, 1998, at 64; see also Ira C. Lupu, *supra* note 79, at 1357-58 (arguing that children need multiple adult influences and that home schooling does not command the level of constitutional protection its proponents claim).

system."¹¹⁸ Instead of offering a menu of values,¹¹⁹ however, most public schools accommodate parental choices by allowing parents to opt their children out of specific programs, assignments, and so forth.¹²⁰ Parents frequently seek exemptions for their children from subjects such as sex education, evolution, music and art. The practice of excusing students from coursework that their parents find objectionable raises the difficult question of how to balance the state's constitutionally mandated tolerance for pluralism against the preferences of parents with particularistic agendas. The problem arises more broadly in arenas where the state, rather than the family, controls the flow of information, such as in libraries and public schools.¹²¹

Some parents strive to create a uniquely tailored curricu-

¹¹⁸ *Ambach v. Norwick*, 441 U.S. 68, 77 (1979); see also *West Va. Bd. of Educ. v. Barnette*, 319 U.S. 624, 637 (1943) (stating that schools' responsibility to "educat[e] the young for citizenship" includes transmitting respect for "scrupulous protection of Constitutional freedoms of the individual").

¹¹⁹ Schools may inculcate nonsectarian value systems, and may also restrict the flow of information within the school in an effort to instill "the shared values of a civilized social order." *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 685 (1986) (holding that a student may be penalized for delivering a speech containing "offensively lewd and indecent" innuendo at a school assembly).

¹²⁰ In Minnesota, for example, a statute requires schools to allow parents to review curricular materials and mandates that schools provide alternative materials to replace those that parents find objectionable for any reason. See MINN. STAT. ANN. § 126.699 (West 1994). Pursuant to this statute, parents in at least one school district objected to "computer technology, drug education, self-esteem training, certain books and audio and visual presentations, and sex education." *Stark v. Independent Sch. Dist. No. 640*, 123 F.3d 1068, 1072 (8th Cir. 1997); see also MASS. GEN. LAWS ANN. ch. LXXI § 32A (West 1998) (requiring that school districts notify parents of the content of any curriculum primarily involving "human sexual education or human sexuality" and afford parents a flexible way of exempting their children from such curricula upon written notice to the school); VA. CODE ANN. § 22.1-207-2 (Michie 1998) (giving public school parents the right to review "the complete family life curricula [sic], including all supplemental materials").

According to People for the American Way, a progressive public interest group, nearly every school district in the country allows parents "to opt their own children out of sexuality and AIDS education, as well as out of specific activities or assignments that conflict with their religious beliefs." PEOPLE FOR THE AMERICAN WAY, A RIGHT WING AND A PRAYER: THE RELIGIOUS RIGHT AND YOUR PUBLIC SCHOOLS 60 (1997) [hereinafter RIGHT WING AND A PRAYER]. This civil liberties watchdog group notes that "preventing one's own child from using materials or participating in a program, an appropriate exercise of parental rights, is not censorship," even where the parents have selected a school outside their own public system. *Id.* at 30.

¹²¹ The problem of *whose* values should be taught in public schools may appear to be intractable. See *Barnette*, 319 U.S. at 641 ("Probably no deeper division of our people could proceed from any provocation than from finding it necessary to choose what doctrine and whose program public educational officials shall compel youth to unite in embracing."); see also William Buss, *School Newspapers, Public Forum, and the First Amendment*, 74 IOWA L. REV. 505, 506 (1989) (discussing the "conundrum" of whether public schools can inculcate majoritarian values while fostering pluralism).

lum that reflects their personal preferences.¹²² Reported cases make clear the extent to which this practice of parents "opting out" on behalf of their children generally goes unquestioned.¹²³ Controversies arise primarily when families or advocacy groups challenge the general availability of curricular, optional or library materials that their own children are already effectively prevented from reading except by stealth.¹²⁴ Some parents even try to shelter their children

¹²² See *Swanson v. Guthrie Indep. Sch. Dist. No. I-L*, 135 F.3d 694, 700 (10th Cir. 1998) (holding that parents do not have a constitutional right to "pick and choose" which courses their children will take at a public school); *Brown v. Hot, Sexy & Safer Prods., Inc.*, 68 F.3d 525, 533 (1st Cir. 1995), *cert. denied*, 516 U.S. 1159 (1996) (stating that the right to rear one's children does not create a right to "dictate the curriculum" at the public school they attend). One should note that Hot, Sexy and Safer Productions, a commercial company, made an interactive presentation to students that many parents might reasonably find was in questionable taste.

¹²³ See, e.g., *Monteiro v. Tempe Union High Sch. Dist.*, 158 F.3d 1022, 1024 (9th Cir. 1998) (describing a school decision that allowed plaintiff African-American student to leave class discussion of *Huckleberry Finn* and another book that used the derogatory term "nigger"); *Coleman v. Caddo Parish Sch. Bd.*, 635 So.2d 1238, 1247, 1266 (La. Ct. App. 2d Cir. 1994) (noting that under state law, a child may be excused from sex education instruction "at the option of his or her parent or guardians"); *Citizens for Parental Rights v. San Mateo County Bd. of Educ.*, 124 Cal. Rptr. 68, 73 n.3, 80 n.15 (Ct. App. 1975) (stating that parents may request that their children be excused from sex education courses and Bible reading, and "[n]o child may attend a class if a request that he not attend the class has been received by the school"); *Hopkins v. Hamden Bd. of Educ.*, 289 A.2d 914, 921 (Conn. Super. Ct. 1971) (identifying plaintiff parents' application for a temporary injunction barring a health education curriculum in part because the parents did not "sincerely and seriously" pursue exemption from the challenged curriculum for their own children). Cf. *Mozert v. Hawkins County Bd. of Educ.*, 827 F.2d 1058 (6th Cir. 1987) (reversing a district court decision which held that a school must continue to accommodate parental requests for exemption from assignments as a matter of law); *Davis v. Page*, 385 F. Supp. 395 (D. N.H. 1974) (holding that there is no constitutional violation where a school requires students to remain in the classroom to watch movies, listen to music, sing, dance and receive education over the religious objections of their parents).

¹²⁴ Litigation against school districts over learning materials normally ensues after parents who have been allowed to modify the academic program presented to their own children proceed to seek removal of material of which they disapprove from circulation to any students within the school. See, e.g., *Monteiro*, 158 F.3d at 1024 (parents seek to force school to remove books from the curriculum); *Campbell v. St. Tammany Parish*, 64 F.3d 184 (5th Cir. 1995) (remanding for inquiry into the school board's motivation for removing a history of voodoo from the school library); *Pratt v. Independent Sch. Dist. No. 831*, 670 F.2d 771, 773 (8th Cir. 1982) (finding unconstitutional a school board decision to remove a controversial film from the school curriculum, rather than accepting a sub-committee recommendation that all parents receive an information sheet advising them that they could exclude their children from viewing the films). On remand, *St. Tammany Parish* was resolved under a consent decree, which limited access to the book to students in eighth grade or above who had written parental permission to see the volume. See Sarah Shipley, *St. Tammany Settles 'Voodoo' Suit*, NEW ORLEANS TIMES PICAYUNE, Apr. 2, 1996, at B1; see also, RIGHT WING AND A PRAYER *supra* note 119, at 32-34 (describing incidents in Alaska, Georgia and Illinois where parents, who had already been allowed to shelter their own children from material they deemed objectionable, sought to remove said material from general use in the schools).

from the enunciated values of the non-public schools to which they have elected to send their children.¹²⁵ In yet another kind of controversy, parents may challenge a decision to shelter all children from material that one group labels objectionable.¹²⁶

The central legal question posed by these fact patterns is where the state's primary obligation lies when controversy over values arise in the public sphere. One approach suggests that the state's goal should be to sustain a neutral marketplace of ideas within the school to the extent that doing so is compatible with curricular goals. A second view would enlist the state as an agent that reinforces the individual parent's authority over values.¹²⁷ Yet another approach, reflected here, suggests that to the extent that the state enforces deference to each family's values by diminishing the le-

¹²⁵ Parents may even seek to restrict what a child hears in private schools that exist to foster a particular religion. Under the laws governing a school voucher system in Milwaukee, Wisconsin, a parent may use public funds to send a child to a parochial school and then demand that the religious school allow that child to "opt out" of any curricular material that offends the parent. See *Jackson v. Benson*, 578 N.W.2d 602, 609 (Wis. 1997), cert. denied, 119 S. Ct. 466 (1998). This provision reflects the high level of discretion given to parents to control what ideas their children receive in a variety of school settings.

In an unusual case, a Roman Catholic family in Florida objected to the family education text used in more than 5,000 Catholic schools in the United States. Initially, the school allowed the children to leave during the brief section on sexuality. The parents then demanded that their children be sheltered completely from the textbook, because if they had access to the book they could read the pages on sex. The school refused to release the children from the general family life curriculum, arguing that it was "a Catholic school. If we don't teach morality, there's no reason for the children to be here." *Dateline NBC: Unorthodox behavior?: Anderson family clashes with Catholic school over issue of sex education in school texts and classroom*, (NBC television broadcast, June 29, 1998), available in WESTLAW, 1998 WL 6615609. Lawsuits and expulsion followed. The children now attend public school, where under state law they can be excused from sex education based on a note from their parents. *Id.* The results of the litigation appear to be unreported.

¹²⁶ A school may not modify its entire curriculum to conform to parental sectarian beliefs. See *Edwards v. Aguillard*, 482 U.S. 578, 593 (1987) (striking down a state statute that allowed schools to bar the teaching of evolution to satisfy sectarian concerns); *Epperson v. Arkansas*, 393 U.S. 97, 106 (1968) (same); *Pratt*, 670 F.2d at 776-77 (finding that a school violates students' right to receive information when it bans classroom use of a controversial film with educational value). But see *Stark v. Independent Sch. Dist. No. 640*, 123 F.3d 1068 (1997) (upholding creation of a public charter school that conforms to sectarian beliefs but allows students to receive broader instruction by travelling to another district school), analyzed with other forms of accommodation to parental preferences in Catherine J. Ross, *Accommodation in Public Schools: Who Decides What Children Learn?*, Comments at the Communitarian Summit, Washington, D.C. (Feb. 27, 1999) (on file with *University of Pennsylvania Journal of Constitutional Law*).

¹²⁷ See Barbara Bennett Woodhouse, *A Public Role in the Private Family: The Parental Rights and Responsibilities Act and the Politics of Child Protection and Education*, 57 OHIO ST. L.J. 393, 411-13 (1996) (criticizing this line of authority as part of a conservative political agenda).

gitimacy of the minor's independent claims, the state actually denigrates the pluralism its institutions are intended to foster.

Where the views of parent and child coincide, the student's right to receive information does not pose a constitutional obstacle to voluntary accommodation of a family's preferences. If a teenager were to challenge her school's accommodation of her parent's request to opt out of a course based solely on the parents' religious beliefs, the case would raise questions of first impression, explored further in Part II, *infra*. If a mature minor sought access to information that the state generally made available to her peers, her search would trigger the principle that "the State may not, consistently with the spirit of the First Amendment, contract the spectrum of available knowledge."¹²⁸

The seminal insight that "knowledge is power" underscores the potential for harm posed by exaggerated public deference to parents who fear that a free flow of ideas to their youngsters outside of the home will undermine family values and authority. Young people instinctively understand the significance of parental mediation of ideas. A seventh grader, seeking to identify a contemporary equivalent for the mind-washing in Aldous Huxley's *Brave New World* did not hesitate in stating that parents have the capacity to be "mind-washers."¹²⁹

The right to receive information is integrally related to any effort to achieve the individual self-realization that is essential to the structure of the First Amendment.¹³⁰ In that sense, the right to receive information is reinforced when it is combined with other autonomy claims protected under the Constitution, as will be discussed in Part II.

II. APPLYING THE RIGHT OF MATURE MINORS TO RECEIVE INFORMATION TO THE EXERCISE OF ACKNOWLEDGED CONSTITUTIONAL RIGHTS

In certain privacy areas concerning autonomy, the courts have expressly recognized individual interests for mature minors who, by definition, do not lack the capacity to exercise constitutional liberties. Indeed, under *Bellotti*, one of the *in-*

¹²⁸ *Griswold v. Connecticut*, 381 U.S. 479, 482 (1965).

¹²⁹ Personal communication from Daniel Ross-Rieder. It can be difficult for a young person to discover his or her own views, even where parents rarely make materials inaccessible. This insight is consistent with the analogy between minors and prisoners discussed in *From Vulnerability to Voice*, *supra* note 5, at 1601-14.

¹³⁰ See *Griswold*, 381 U.S. at 482 (asserting "[t]he right of freedom of speech . . . includes the right to receive, the right to read . . . and the freedom of inquiry").

diciae of a mature minor is the "[l]ability to make critical decisions in an informed . . . manner."¹³¹ Similarly, a mature minor is possessed of something approaching the "full capacity for individual choice which is the presupposition of First Amendment guarantees."¹³² Individual choice is probably most meaningful when choices are informed decisions, and decision-makers have access to a variety of viewpoints before making critical decisions. It is implicit in the Supreme Court's recognition of autonomy rights for mature minors that, to the extent those autonomy rights exist, minors have rights, commensurate with those of adults, to speech that will enable them to make informed choices.

The problem of the minor's right to information may initially appear to present the classic case in which "two fundamental constitutional rights appear to be at odds."¹³³ Parental authority seems pitted against the emerging autonomy of maturing minors. That formulation, however, exaggerates the conflict. The right to receive information applies in respect to the state, as represented by such bodies as schools, libraries and public health clinics. Parents, in contrast, cannot be required to provide to their children information that undermines the beliefs parents are trying to instill.¹³⁴ Further, parents have great advantages in the marketplace of ideas. First, parents have the earliest and most consistent opportunities to indoctrinate their children. Second, parents make all critical decisions about what information to make available to their children while the children are in their most formative years.¹³⁵ Third, parents have an ongoing opportunity to help their children to think critically about conflicting ideas and ideologies.¹³⁶

¹³¹ *Bellotti v. Baird*, 443 U.S. 622, 634 (1979) (plurality opinion).

¹³² *Id.* at 635 n.13 (quoting *Ginsberg v. New York*, 390 U.S. 629, 649 (1968)).

¹³³ *Monteiro v. Tempe Union High Sch. Dist.*, 158 F.3d 1022, 1024 (9th Cir. 1998) (discussing the "particularly difficult . . . clash" between the right of students to read *Huckleberry Finn* and the right of African-American students to be free from a racially hostile environment).

¹³⁴ Professor Lupu argues that children benefit when more than one adult within a family makes decisions about child-rearing because the differing perspectives and values of the adults increase the sources of information available to the child. See Lupu *supra* note 79, at 1332.

¹³⁵ Parental choices include decisions that result from voluntary delegation of childcare duties and about matters such as how much television their children watch. For purposes of this discussion, I assume that parents have retained legal and daily custody of their children, without involvement of, for example, the child welfare or foster care systems.

¹³⁶ This point is well illustrated in *Monteiro*:

"[T]he fact that a student is required to read a book does not mean that he is being asked to agree with what is in it. It cannot be disputed that a necessary component of any education is learning to think critically about offensive ideas—without that ability one can do little to respond to them."

Nonetheless, rights are not absolute. This is especially true where minors are concerned, as demonstrated above. The three jurisprudential cornerstones that support a minor's right to receive information suggest limiting principles. Minors' rights to receive information will be strongest where it is used to impart meaning to another fundamental right. The state cannot, consistent with the right to receive information, enforce parental restrictions on access to information needed to invoke a protected liberty interest. These presumptions are applicable where the minor who seeks to be treated as mature under the law confronts a decision that meets the following three criteria: (i) the decision must be significant, and implicate constitutionally recognized liberties; (ii) the decision will not be effective if it is postponed; and (iii) the results of the decision are irrevocable.

A young woman's decision about whether or not to have an abortion clearly satisfies all three of these criteria. There is a constitutional right to an abortion;¹³⁷ under law an abortion must be performed by a certain point in the pregnancy or not at all,¹³⁸ and no matter which decision a woman makes, the result (birth or termination) is irrevocable. The same girl's decision to marry could, arguably, be postponed. In deference to the respect the law traditionally accords to parental control of minors, the right to know, as discussed here, is proposed for situations involving hybrid rights. In such situations, realization of other constitutional rights depends on access to information, and those rights cannot be exercised meaningfully if the young person must wait until the age of majority.¹³⁹

Nothing inherent in the right of minors to receive information suggests that a minor seeking knowledge would come from a family that adheres to an orthodox religious tradition. The following discussion draws heavily from examples in-

158 F.3d at 1031.

¹³⁷ See *Roe v. Wade*, 410 U.S. 113 (1973) (establishing a constitutional right to abortion).

¹³⁸ See *Planned Parenthood v. Casey*, 505 U.S. 833, 846 (1992) (affirming states' power to restrict abortion after the point of fetal viability).

¹³⁹ It may seem that the right to receive information advocated here should extend to all efforts of mature minors to obtain information that will assist the quest for identity formation, whether or not they are supported by constitutional claims. I am not prepared to make such a broad claim, in part because the justifications for the child's interest as opposed to the parents' privileges would seem less urgent and less compelling. The constitutional claim of mature minors to information over parental objection is strongest when the information will serve constitutionally protected liberty interests, the exercise of which cannot be postponed. The limitations I suggest here are designed to accord respect to the parental role in child rearing, to draw lines that will avoid a slippery slope and to present factual situations that make the strongest case for the right I propose.

volving deeply religious families, in part because case law suggests that these are the families most likely to attempt to restrict their children's access to competing world views.¹⁴⁰ Religious beliefs may also create a competing "hybrid claim" in which the assertion of parental rights is strengthened by the accompanying assertion of a free exercise claim.¹⁴¹ Religion is not, however, a prerequisite. Any deeply held and contracted set of beliefs might place a teenager in dire need of information. If, for example, the teenage son of confirmed atheist Madalyn Murray were dying, and his mother barred him from seeking out religious ideas,¹⁴² the right proposed here would apply. This right to information would also apply if parents imposed on their children a set of beliefs that stemmed from entirely secular sources which resulted in the state limiting the information that reached those children.¹⁴³

The claim that minors have a right to receive information is sharply framed where minors have a cognizable claim to

¹⁴⁰ See, e.g., *Stark v. Independent Sch. Dist. No. 640*, 123 F.3d 1068, 1070 (8th Cir. 1997) (analyzing the constitutional issues relating to the establishment of a school by a religious group that has a "sincerely held religious belief in avoiding the use of technology . . ."); *Davis v. Page*, 385 F. Supp. 395 (D. N.H. 1974) (reviewing a civil rights claim brought on behalf of elementary school children by their father on the grounds that the school's policy to require students to remain in classrooms while religiously offensive activities took place violates the children's constitutional rights); *Coleman v. Caddo Parish Sch. Bd.*, 635 So.2d 1238 (La. Ct. App. 1994) (addressing an action brought by parents on behalf of their children to enjoin the use of sex education curricula by the school).

¹⁴¹ See *Employment Div., Dep't of Human Resources v. Smith*, 494 U.S. 872, 881-82 (1990) (discussing *Wisconsin v. Yoder*, 406 U.S. 205, 215-19 (1972)). In *Smith*, the Supreme Court reinterpreted *Yoder* and other free exercise cases to stand for the principle that the First Amendment only bars application of a neutral, generally applicable law over religious objections when those objections are asserted "in conjunction with other constitutional protections" such as the right to direct the upbringing of one's children. This has come to be known as a "hybrid right." *Id.* My suggestion here that two liberty claims may be mutually reinforcing should not be interpreted as approval of the doctrine enunciated in *Smith*. For criticisms of the limitation of *Yoder* announced in *Smith*, see *Smith*, 494 U.S. at 894 (O'Connor, J., concurring); see also *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 566-67 (1993) (Souter, J., concurring); Douglas Laycock, *The Remnants of Free Exercise*, 1990 SUP. CT. REV. 1; Michael W. McConnell, *Free Exercise Revisionism and the Smith Decision*, 57 U. CHI. L. REV. 1109 (1990).

¹⁴² See *Murray v. Curlett*, 179 A.2d 698, 699 (Md. 1962) (stating that in actuality, Ms. Murray and her son informed the court that they were both atheists), *rev'd sub nom.* *School Dist. of Abington Township v. Schempp*, 374 U.S. 203 (1963) (holding that state action requiring public schools to begin each day with reading from the Bible and recitation of the Lord's Prayer violates the Establishment Clause of the U.S. Constitution).

¹⁴³ See *Immediato v. Rye Neck Sch. Dist.*, 73 F.3d 454, 462 (2d Cir. 1996), *cert. denied*, 519 U.S. 813 (1996) (concluding that where parents seek to exempt their child from educational requirements based on purely secular values, the state need only show a rational basis for the educational requirement).

autonomy rights regardless of their parents' preferences.¹⁴⁴ These rights include, among others, (i) the right to an abortion without parental notice or consent;¹⁴⁵ (ii) the right to contraception and sexuality;¹⁴⁶ and (iii) the right to exercise autonomous religious beliefs,¹⁴⁷ as posed in the opening hypothetical of the teenager dying from leukemia. Consideration of the right to receive information in conjunction with rights claims in these three areas indicates that information is indispensable to the meaningful exercise of liberties for mature minors as well as for adults.¹⁴⁸

A. Abortion

Adolescent girls whose views on abortion differ from those of their parents may find themselves in particular jeopardy in families that are deficient in meaningful communication.¹⁴⁹ Deeply held moral beliefs about abortion on both sides of the debate ignite a rare "clash of absolutes."¹⁵⁰ Part I of this article sets out a three-part justification for recognizing the right of minors to receive information even in the face of their parents' objections. First, the right to receive information is recognized for adults as an integral aspect of freedom of speech. Second, minors possess rights under the Speech Clause, even in controlled environments such as schools. Third, where minors assert constitutional rights independent of their par-

¹⁴⁴ See *Buckholz v. Leveille*, 194 N.W.2d 427, 429 (Mich. Ct. App. 1971) (finding no authority requiring a minor to have the consent of his or her parents to sue to enforce constitutional liberties).

¹⁴⁵ See *Planned Parenthood v. Casey*, 505 U.S. 833, 899 (1992) (holding "that a state may require a minor seeking an abortion to obtain the consent of a parent or guardian, *provided* that there is an adequate judicial bypass procedure.") (emphasis added).

¹⁴⁶ See *Carey v. Population Servs. Int'l*, 431 U.S. 678, 694 (1977) (stating that "[s]ince the state may not impose a blanket prohibition, or even a blanket requirement of parental consent, on the choice of a minor to terminate her pregnancy, the constitutionality of a blanket prohibition of the distribution of contraceptives to minors is *a fortiori* foreclosed").

¹⁴⁷ The Supreme Court has never dealt squarely with this issue, but it has recognized the state's interest in protecting minors' rights to grow into independent citizens. See *Prince v. Massachusetts*, 321 U.S. 158, 165 (1944).

¹⁴⁸ In this sense, the right of mature minors to receive information may be viewed as a hybrid right in which the assertion of the right to receive information and the assertion of another autonomous right mutually reinforce each other. See discussion of hybrid rights *supra* note 140. The idea that rights may be mutually reinforcing should not normally mean that neither right could be asserted independently.

¹⁴⁹ LAURENCE H. TRIBE, ABORTION: THE CLASH OF ABSOLUTES 203, 209-10 (1990) (arguing that in families where communication has broken down, parental consent or notification laws are unlikely to "facilitate respectful dialogue between children in crisis and their parents").

¹⁵⁰ See generally *id.*

ents' claims, the state may not reinforce parental limitations by constricting access to information that is available to others. The problem of the abortion decision builds smoothly on these principles.

In the "ideal" family,¹⁵¹ a girl would be able—and even eager—to seek a parent's advice upon learning that she was pregnant. In some families, however, such communication is or feels unattainable.¹⁵² During the process of considering what to do, the girl who cannot confide in her parents must determine what her medical options are, how those mesh with her belief system, and what legal steps she must take if she decides to seek an abortion without her parents' consent. All of these decisions require knowledge. If the adolescent goes to a privately funded clinic she may receive comprehensive information, including the advice that she consult with a parent or other adult if possible.¹⁵³ If, however, she relies on a publicly funded clinic that is barred by statute from dispensing information about abortion, she may not fully understand the procedures available to her or the medical advantages of acting quickly if she decides to terminate the pregnancy.¹⁵⁴ As Justice Blackmun argued in his dissenting opinion in *Rust v. Sullivan*, "it is of no small significance that the speech . . . suppress[ed]" about abortion by federal regulations applicable to clinics receiving federal funds "is truthful information regarding constitutionally protected conduct of vital importance to the listener."¹⁵⁵

The Supreme Court has held that states which require parental consent for abortions performed on minors must provide a judicial bypass procedure that allows the minor to es-

¹⁵¹ Courts regularly distinguish the "ideal" family, which legislatures apparently have in mind when they enact regulations limiting the ability of a teenager to obtain an abortion, from the families in which the difficulty of securing parental consent creates social and legal problems. See *Hodgson v. Minnesota*, 497 U.S. 417, 418 (1990).

¹⁵² The majority of pregnant minors do consult with their parents. See *American Academy of Pediatrics v. Lungren*, 32 Cal.2d 546, 561 (Ct. App. 1994). For some adolescents, however, such consultation "simply is not a reasonable possibility." *Id.* (stating that even the state's witnesses conceded that many families have none of the attributes for coping effectively with family problems, and noting that the trial court found that compelling a minor from an abusive family to discuss her pregnancy with her parents could endanger the girl's physical and mental safety).

¹⁵³ See *id.* at 560 (citing evidence which shows that standardized nondirective protocols encourage teenagers to consult their parents and provide "a wealth of information and counseling designed to ensure that they understand and truly consent to whatever medical decision they ultimately make").

¹⁵⁴ See *id.* at 561-62 (noting that minors in states having parental consent statutes delay the decision to undergo an abortion, and that the residual risk of abortion increases as pregnancy advances).

¹⁵⁵ *Rust v. Sullivan*, 500 U.S. 173, 215 (1991) (Blackmun, J., dissenting). It is irrelevant that *Rust* involved communication between doctors and adult women.

tablish, among other things, that she is mature enough and well enough informed to make an independent decision.¹⁵⁶ Since maturity is already defined in part by a showing that the teenager is informed and is able to use information rationally, knowledge therefore carries double weight in an abortion bypass hearing – that is, the minor must demonstrate knowledge to show maturity and once again must demonstrate the ability to make this particular independent decision. This weighing of knowledge in the abortion context makes access to information imperative.

In most areas of the country,¹⁵⁷ “only an infinitesimal number” of petitions seeking abortion without parental consent have been denied.¹⁵⁸ In the rare instances in which judges deny a parental bypass petition, they focus heavily on the depth of the petitioner’s knowledge. The Supreme Court of Nebraska, for example, concluded that a pregnant thirteen-year-old ninth grader failed to demonstrate her maturity by clear and convincing evidence because she “was unable to communicate to the judge a sufficient understanding of the medical procedure involved, [or] the associated risks” of an abortion.¹⁵⁹ At trial, the girl had testified that she understood the risks to include “bad cramps or you may get something up inside you that could cause risks.”¹⁶⁰ Although she had received information and counseling from Planned Parenthood and had discussed the implications and risks of an abortion with an older married sister who gave “the minor all

¹⁵⁶ See *Bellotti v. Baird*, 443 U.S. 622, 643-44 (1979) (plurality opinion) (holding that the judicial bypass procedure must allow the minor to establish that the abortion would be in her “best interests,” and furthermore, ensure her anonymity and be expedited); see also *Lambert v. Wicklund*, 520 U.S. 292, 293 (1997) (holding that a judicial bypass allowing waiver of notice requirement if not in the minor’s best interest was sufficient to protect a minor’s right to an abortion); *Planned Parenthood v. Casey*, 505 U.S. 833, 899 (1992) (holding that a parental consent statute only passes constitutional muster if it contains a method by which the minor can obtain an abortion without parental consent); *Ohio v. Akron Ctr. for Reprod. Health*, 497 U.S. 502, 510-13 (1990) (restating the four criteria that make a bypass procedure constitutionally acceptable, but declining to decide whether a parental notification statute, as opposed to a parental consent statute, must provide for a judicial bypass proceeding).

¹⁵⁷ The opinions in bypass hearings are reported only if the trial court judge denies the petition. Many of the reported cases on parental consent come from Alabama. See Erin Daly, *Reconsidering Abortion Law: Liberty, Equality, and the New Rhetoric of Planned Parenthood v. Casey*, 45 AM. U. L. REV. 77, 110 n.159 (1995).

¹⁵⁸ *American Academy of Pediatrics v. Lungren*, 32 Cal.2d 546, 555-56 (Ct. App. 1994) (holding that consent requirements for abortions violate privacy rights and do not serve the statute’s enunciated goals); see also *TRIBE*, *supra* note 145, at 209 (noting that only nine of 3,573 petitions in Minnesota were denied during the first four-and-one-half years of the statute’s operation).

¹⁵⁹ *In re Anonymous 1*, 558 N.W.2d 784, 788 (Neb. 1997).

¹⁶⁰ *Id.* at 787.

the information she could," the court held that the petitioner displayed an inadequate command of the medical issues to support a finding of maturity.¹⁶¹ The court placed a heavy burden on this young girl. It is doubtful that most adults display any greater retention and comprehension of the medical risks explained to them before they undergo what they regard as a routine procedure.¹⁶² The failure to seek and obtain information and then to comprehend it fully appears to be one of the most fatal mistakes a minor can make in preparing for a bypass proceeding.¹⁶³

Judges hearing bypass petitions also appear to have little sympathy for girls who fail to learn about and use contraception.¹⁶⁴ The worst case alternative—unwanted pregnancy—underscores the importance of access to information about contraception and sexual activity, both of which are considered in the next section of this article.

B. Contraception and Sexuality

Not much has changed since Justice Stevens observed in 1985 that "it cannot go without notice that adolescent children apparently have a pressing need for information about contraception."¹⁶⁵ Fascination with romance, sexuality and sex are undeniably part of normal adolescent development regardless of whether fantasy and speculation lead to activity. This reality has hardly escaped the attention of leading jurists. At oral argument in the Supreme Court in *Reno v.*

¹⁶¹ *Id.*

¹⁶² Cf. *H.B. v. Wilkinson*, 639 F. Supp. 952, 957-58 (D. Utah 1986) (denying the bypass application of a bright, "sufficiently mature" seventeen-year-old because, among other things, she did not fully appreciate the necessity of revealing her secret pregnancy if medical complications were to result from the proposed abortion or the risk of post-abortion depression.)

¹⁶³ See, e.g., *In re Anonymous*, 650 So.2d 923, 925 (Ala. Civ. App. 1992) (reversing denial of waiver where the minor was "sufficiently mature and informed" to make a decision regarding abortion without parental consent); *In re Anonymous*, 650 So.2d 919, 921 (Ala. Civ. App. 1992) (affirming denial of waiver where the applicant failed to seek advice from a medical professional or a counselor concerning an abortion and other alternatives); *In re Anonymous*, 597 So.2d 709, 710 (Ala. Civ. App. 1992) (affirming the juvenile court's denial of waiver where the applicant failed to seek medical advice or consult with any adult).

¹⁶⁴ See *Wilkinson*, 639 F. Supp. at 956-58 (denying the motion of a seventeen-year-old girl, who never obtained or used contraception, to enjoin the application of a Utah statute requiring a physician to notify parents of an immature minor seeking an abortion); *In re Jane Doe 1*, 566 N.E.2d 1181, 1184 (Ohio 1990) (affirming denial of waiver where, among other things, the 17-year-old petitioner had already had one abortion the previous year and had discontinued use of birth control measures).

¹⁶⁵ *Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60, 74 n.30 (1983) (citing social science literature on sexual activity among teenagers).

American Civil Liberties Union,¹⁶⁶ for example, Justice Breyer pressed the Deputy Solicitor General of the United States to acknowledge what most adults take for granted: adolescents are very interested in sex and in their own sexuality. Justice Breyer was concerned that the portions of the Communications Decency Act at issue, which the Supreme Court overturned in its ruling, would make typical conversations among teenagers illegal if conducted on the Internet. "Suppose," Justice Breyer asked:

a group of high school students decide to communicate across the internet and they want to tell each other about their sexual experiences, whether those are real or imagined That's been known to happen in high school (Laughter) If you get seven high school students on a telephone call, I bet that . . . happens from time to time.¹⁶⁷

Conversation and curiosity do not necessarily lead to action. Rachel, the Hasidic romance reader described in Part I *supra*, was especially intrigued by the portrayal of heterosexual love and sexuality in her purloined novels.¹⁶⁸ Neither the knowledge gleaned from these books, nor the fantasies and dreams they stimulated, gave Rachel the courage to object when her parents arranged a marriage for her.¹⁶⁹

For most teenagers, sexuality provides a prime example of what inspired Professor Franklin Zimring to call adolescence a "learner's permit" for life.¹⁷⁰ Professor Zimring's metaphor is apt; as young people mature, they need to develop the ability to cope with increasing freedoms in a number of areas. At first, safe experimentation requires close supervision by parents and other responsible adults.¹⁷¹ Greater independence follows gradually, as the individual teenager develops capaci-

¹⁶⁶ 521 U.S. 844 (1997).

¹⁶⁷ *Reno v. ACLU*, 1997 U.S. TRANS. LEXIS 40, at *11-12 (Mar. 19, 1997). Deputy Solicitor General Waxman replied wryly, "It may." *Id.*

¹⁶⁸ ABRAHAM, *supra* note 88, 246-47.

¹⁶⁹ See generally *id.* The notion of romantic love did help to steel Rachel's resolve when she later decided to leave her husband. See *id.* at 286. But it hardly led her to abandon all traces of parental influence. When the novel ends, Rachel is a divorced woman living in her parents' home. See *id.* at 294.

¹⁷⁰ FRANKLIN E. ZIMRING, *THE CHANGING LEGAL WORLD OF ADOLESCENCE*, 89-96 (1982).

¹⁷¹ I do not intend to suggest that the process of maturation is always, or even usually, smooth whether with regard to sexuality or other areas of self-discovery. Many young people abuse parental trust, and many parents provide inadequate supervision. See *Alfonso v. Fernandez*, 606 N.Y.S.2d 259, 275 (1993) (Eiber, J., dissenting) (discussing how some teenagers do not have actively involved parents who are available to provide consent); *id.* (Miller, J., dissenting) (noting that "some students who have interested parents are beyond their practical control in matters of sexuality").

ties and demonstrates responsibility.¹⁷²

The legal question that arises in relation to the right to receive information is whether the state can or should honor the wishes of those parents who do not wish to give their teenage child a "learner's permit" for sexuality and do not want their teenager to have access to information about "driving safely."¹⁷³ The right of minors to information about sexuality and contraception flows analytically from the privacy right to obtain an abortion without parental consent: "if minors are permitted to obtain treatment for the consequences of unprotected sexual intercourse without parental consent or notification, it is inconsistent to restrict their access to the means by which they can prevent an unwanted pregnancy or protect themselves from sexually transmitted diseases, including the deadly HIV virus."¹⁷⁴ Similarly, the U.S. Court of Appeals for the Third Circuit recently reiterated a district court's holding which stated that "[a]ccess to contraceptives may be just as important as access to abortions," which is protected for minors.¹⁷⁵ The withholding of health information in the hope of preventing sexual activity fails to meet a rationality standard,¹⁷⁶ much less the higher standard of review required to regulate fundamental rights such as privacy. For the state to withhold information about safe sex in the hopes of delaying sexual activity would be the equivalent of banning motorcycle helmets and information about how to

¹⁷² Even commentators who downplay the importance of autonomy for children recognize the legitimacy of Professor Zimring's metaphor. See Bruce C. Hafen & Jonathan O. Hafen, *Abandoning Children to Their Autonomy: The United Nations Convention on the Rights of the Child*, 37 HARV. INT'L L.J. 449, 456 (1996).

¹⁷³ See STEPHEN L. CARTER, *THE CULTURE OF DISBELIEF: HOW AMERICAN LAW AND POLITICS TRIVIALIZE RELIGIOUS DEVOTION* 200-03 (1993) (identifying sex education as leading to "bitter battles" over values in the classroom). Professor Carter's writing sensitizes the reader to the genuine concerns of religious believers who believe that the abstinence message is a good and simple truth. *Id.* at 201-02. He gives short shrift, however, to the corresponding legitimacy of the opposing concern that many young people might die if the safe sex message is not communicated. *Id.* Because of the long incubation period associated with AIDS, most of the young adults diagnosed with AIDS probably contracted the virus as teenagers. U.S. CENTERS FOR DISEASE CONTROL AND PREVENTION, *ADOLESCENTS AND HIV/AIDS: FACTS* (Mar. 1998).

¹⁷⁴ *Alfonso*, 606 N.Y.S.2d at 271 (Eiber, J., dissenting). It is important to note, however, that this case involved distribution of condoms in public schools, rather than of information.

¹⁷⁵ *Parents United for Better Schs., Inc. v. School Dist. of Philadelphia Bd. of Educ.*, 148 F.3d 260, 270 (3d Cir. 1998) [hereinafter *Parents United II*]. In this portion of its opinion, the Third Circuit cites *Parents United for Better Schs., Inc. v. School Dist. of Philadelphia Bd. of Educ.*, 978 F. Supp. 197, 209 (E.D. Pa. 1997) [hereinafter *Parents United I*].

¹⁷⁶ See *Carey v. Population Servs. Int'l*, 431 U.S. 678, 715 (1977) (Stevens, J., concurring) (arguing that "[a]n attempt to persuade by inflicting harm on the listener is an unacceptable means of conveying a message that is otherwise legitimate").

wear them in order to emphasize society's disapproval of bikers.¹⁷⁷

Federal courts have held that teenagers have privacy rights in contraception even if they act without parental consent. The Supreme Court held in *Carey v. Population Services International* that minors have privacy rights concerning reproductive choices, including contraception.¹⁷⁸ Lower federal courts have expressly held that teenagers possess protected privacy interests in contraception as a means of avoiding pregnancy and of preventing disease.¹⁷⁹ The failure to use condoms in the age of AIDS threatens young people with the risk of life-threatening illness, as irreversible as the birth of a child in the abortion cases. A federal district court in Boston recently held that the importance to minors of receiving information about condoms and the prevention of AIDS outweighed any possible government interest in prohibiting public service advertising about condom use on the mass transit system.¹⁸⁰

The right of minors to receive information would increase and protect the availability to minors of accurate information

¹⁷⁷ See *id.*

¹⁷⁸ See generally *id.* Although *Carey* was a plurality opinion, and is commonly referred to as such, the holding that teenagers have privacy rights regarding procreation commanded five votes. See *id.* at 681 (plurality opinion) (Brennan, J., joined by Stewart, Marshall and Blackmun, JJ.); *id.* at 693, 702 (White, J., concurring) (agreeing with the plurality in the result and including "with respect to Part IV" in which the plurality recognized the privacy interests of minors in contraception). Cf. *id.* at 703 (White, J., concurring) and *id.* at 713 (Stevens, J., concurring) (rejecting as frivolous the argument that minors have a privacy right in contraception over the objections of parents and the state).

¹⁷⁹ See *Doe v. Irwin*, 615 F.2d 1162, 1166 (6th Cir. 1980) (stating that the minor's right of privacy includes the right to obtain contraceptives and sex counseling without parental consent); *Parents United I*, *supra* note 175, at 209-10 (holding that minors have a constitutional right to privacy encompassing the use of contraceptives), *aff'd on other grounds*, 148 F.3d at 269-70 (Scirica, J.) (upholding a consensual condom distribution program with a parental opt-out provision, and noting the District Court's observation that during the past two decades the Supreme Court has consistently rejected blanket parental consent requirements for abortions) (citing *Planned Parenthood Ass'n of Utah v. Matheson*, 582 F. Supp. 1001, 1009 (D. Utah 1983)); see also, *Doe*, 615 F.2d at 1168; *Curtis v. School Community of Falmouth*, 652 N.E.2d 580 (Mass. 1995), *cert. denied*, 516 U.S. 1067 (1996); *T.H. v. Jones*, 425 F. Supp. 873, 881 (D. Utah 1975) *aff'd on statutory grounds*, 425 U.S. 986 (1976).

¹⁸⁰ *AIDS Action Comm. of Mass. Inc. v. Massachusetts Bay Transp. Auth.*, 849 F. Supp. 79, 84 (D. Mass. 1993), *aff'd on other grounds*, 42 F.3d 1 (1st Cir. 1994). My article, *Anything Goes*, *supra* note 43, discusses AIDS Action and related cases in greater detail with emphasis on the state's alleged interests in regulating speech. That article balances the competing claims of the state and parents differently than in the argument here; there, I emphasize the state's failure to establish a compelling interest in regulating protected speech as compared to the interest of parents who wish their children to have access to such speech. The theses of the two articles are not inconsistent. Both arguments would result in a more vibrant marketplace of ideas being available to young people as well as to adults.

about contraception. My argument is limited to questions about the right to knowledge; it should not be construed as supporting behavioral license. For purposes of my argument, it does not matter how young people use the information they obtain: they may be trying to decide whether to engage in sexual relations at all, or choosing the most reliable, safest form of birth control because they have already decided to become sexually active, or may primarily be interested in preventing sexually transmitted diseases. The precedents applicable to adults dictate that access to information cannot be denied based on speculation and fear that the information might be used in the service of a legal activity, the morality of which is subject to debate.¹⁸¹

The right of minors to receive information about contraception and sexuality, regardless of their parents' views, would arise most frequently in one of three institutional settings: health clinics that receive public funds, libraries and public schools. In each instance, the hybrid claim created by the right to receive information, combined with the minor's recognized privacy interest in contraception, would prevent the state from imposing barriers on young people seeking information without parental consent.

Consider the clinic that receives public funds and provides both information and contraceptives.¹⁸² The constitutional right to receive information should ensure access to counseling in such clinics, even without parental notification and consent.¹⁸³ Clinics frequently offer educational materials and counseling in addition to concrete medical services, including prescriptions and contraceptive devices. Indeed, clinics may require minors to receive education, including advice on risks, before they receive medical treatment.¹⁸⁴ Public clinics may even encourage parental consent, consultation and participation, but may not legally require it without violating an adolescent's privacy rights.¹⁸⁵ Where the state does not re-

¹⁸¹ See *supra* Part I.A.

¹⁸² Title X of the Public Service Act, 42 U.S.C. § 300(a) (1994), which authorizes comprehensive family planning services, requires confidentiality regarding those services, including services rendered to adolescents. See *Planned Parenthood Fed'n of America, Inc. v. Heckler*, 712 F.2d 650, 659-60 (D.C. Cir. 1983) (discussing Congress' intent that family planning services be confidential).

¹⁸³ My argument here suggests that the right of minors to obtain such information is not dependent on the continuation of current statutory protections. The right to receive information means that family planning materials cannot be constitutionally withheld from minors if the same material is made available to adults.

¹⁸⁴ See *Doe*, 615 F.2d at 1163 (noting that minors must attend an educational "rap session" at the state-funded clinic before receiving medical services related to contraception).

¹⁸⁵ *Id.* at 1163-64, 1166 (noting that minors are encouraged to bring parents with

quire minors to visit such clinics, however, it arguably does not even impinge on parental rights, whether they are couched in the language of the fundamental right of parenting, or as a free exercise claim.¹⁸⁶ To this extent, the public health clinic is easily distinguished from the more complicated case of the public school, which operates under a regime of compulsory education.

In a public library, as in a public clinic, the child of parents whose religious beliefs bar the use of birth control under any circumstances, as well as sex outside of marriage, could rely on the right to receive information to support his efforts to learn about sexuality. Parental consent may be required, however, to see the pertinent books and magazines.¹⁸⁷ The filters installed on many library computers prevent access to all sites containing the term "sex," including pages devoted to contraception and prevention of sexually transmitted diseases.¹⁸⁸ Such restrictions unconstitutionally interfere with the minor's right to information in the service of a constitutionally protected privacy right.

If the right of mature minors to receive information under the circumstances proposed here gains recognition, current presumptions would be reversed. Instead of requiring young people to obtain consent before they can consult controversial materials, books would be available to minors over a certain age, unless their parents specifically instructed the institutions to deny those minors access to certain information. This approach flows from the observation in the context of abortions that it is hard to distinguish parental notice from parental consent requirements. Parents who wish to block

them to the rap sessions, and to talk with their parents about "their sexual interests," but are not compelled to do so); see also *Parents United I*, *supra* note 175, at 209 (citing *County of St. Charles v. Missouri Family Health Council*, 107 F.3d 682, 684-85 (8th Cir. 1997)) (reviewing cases and concluding that all circuit courts which have reached the question have ruled that parental consent cannot be required under Title X).

¹⁸⁶ See *Doe*, 615 F.2d at 1168 (noting that this is not a situation where the state is requiring or prohibiting some activity); see also *Curtis v. School Community of Falmouth*, 652 N.E.2d 580, 586 (Mass. 1995) (asserting that a coercive or compulsory effect on claimant's rights is necessary to support allegations of a violation of parental liberty).

¹⁸⁷ See, e.g., HERBERT N. FOERSTEL, *BANNED IN THE U.S.A. A REFERENCE GUIDE TO BOOK CENSORSHIP IN SCHOOLS AND PUBLIC LIBRARIES* 167 (1994) (describing placement of a public library book on homosexuality behind the circulation desk, usable only on request); PEOPLE FOR THE AMERICAN WAY, *ATTACKS ON THE FREEDOM TO LEARN* 101, 102 (1996) (citing incidents where challenges to library books led to imposition of parental consent requirements).

¹⁸⁸ See Ann Beeson & Chris Hansen, *Fahrenheit 451.2: Is Cyberspace Burning?* (visited Sept. 4, 1999) <<http://www.aclu.org/issues/cyber/burning.htm>> (describing both intentional and unintentional consequences of computer filtering systems).

the flow of available information to their children should bear the burden of imposing the restrictions, just as when they desire to opt their children out of a school's sex education or biology curriculum.¹⁸⁹ If a mature minor whose parents have erected a barrier to the receipt of information from a public institution needs that information to pursue a hybrid right, such as contraception, libraries could easily designate an experienced staff member to assess such claims. The assessment would involve evaluating the maturity of the petitioner's presentation, the importance of the independent liberty interest, and the immediacy of the mature minor's need to obtain the material. I do not envision an overwhelming number of bypass petitions coming before librarians, let alone before the courts. As with the use of judicial bypass procedures in the abortion context, it seems likely that through such an assessment, young people with enough seriousness of purpose to discuss such matters with an adult stranger would obtain the information they seek. But to be meaningful, rights must be enforceable. A mature minor, therefore, must be permitted to seek judicial review after exhausting administrative channels, but only when the underlying claim involves the exercise of an independent autonomy right. The defendant in such actions would be the government entity that honored the parents' opt-out request, not the petitioner's parents.

The question of whether parents may prevent their teenage children from receiving information in school about sex, sexually transmitted diseases, and prevention is an even closer question.¹⁹⁰ The spread of sexually transmitted diseases, including AIDS, has led many public schools to supplement comprehensive sex education courses with condom distribution programs.¹⁹¹ Only three reported cases consider

¹⁸⁹ "[T]he state is required to plan its curriculum on the basis of educational considerations" *Citizens for Parental Rights v. San Mateo County Bd. of Educ.*, 51 Cal. App. 3d 1, 18 (1975). "[S]tudent[s] [however,] may be excused from any part that conflicts with the parents' religious beliefs." *Id.* at 19.

¹⁹⁰ See *Alfonso v. Fernandez*, 606 N.Y.S.2d 259, 266 (1993) (noting that the suit did not challenge the educational component of the program, even though students would be exempted from instruction if their parents agreed to instruct them at home, informed by materials made available by the school); see generally *Curtis*, 652 N.E.2d at 586 (holding that there is no burden on parents where it is entirely up to the student to choose whether to read literature or seek counseling which the school makes available); *Parents United I*, *supra* note 175, *rev'd*, 148 F.3d 260 (3d Cir. 1998) (not reaching the question of a minor's right to challenge a parental decision to bar participation in school sex education classes, counseling, and condom distribution programs).

¹⁹¹ Catherine Weiss & Sherrill Cohen, *Condom Availability Programs in the Public Schools: Approved in the Courts*, 26 HUM. RTS. 19 (1999) (noting that "[s]chools that have adopted condom availability programs did so primarily in response to the alarming rates of HIV infection among teenagers"). Weiss and Cohen served as lead

constitutional challenges brought by parents against condom distribution programs in public schools.¹⁹² Authorities are divided on whether schools may distribute condoms directly to students.¹⁹³ The sole court to overturn a condom distribution program expressly distinguished provision of condoms from provision of information:

This is not a case in which parents are complaining solely about having their children exposed to ideas or a point of view with which they disagree or [which they] find offensive [S]tanding alone, such opposition would falter in the face of the public school's role in preparing students for participation in a world replete with complex and controversial issues. However, the condom availability component of the [school's] distribution program creates an entirely different situation. Students are not just exposed to talk or literature on the subject of sexual behavior¹⁹⁴

The court understood that it is critical to distinguish between behavior, in this instance defined by possession of contraceptive devices and a presumption of imminent sexual activity, and receipt of ideas.

The right to receive information would mean that a sixteen-year-old could demand information even if his parents withheld consent for him to participate in the condom program at his school.¹⁹⁵ If the program includes both information about, and distribution of, condoms, as does the program in the Philadelphia schools, the student should have a right to receive information from the schools, related to fundamental privacy interests even if, given his parents' objections, he does not have a constitutional right to receive the actual condoms from the school. He can obtain condoms elsewhere.¹⁹⁶

counsel in *Parents United I*.

¹⁹² See *Parents United II*, *supra* note 175 (upholding the program); *Curtis*, 652 N.E.2d 580 (upholding a condom distribution program); but see *Alfonso*, 606 N.Y.S.2d at 267 (overturning the condom distribution program because it lacked a parental opt-out provision, but not considering the informational portion of the school district's efforts to combat sexually transmitted diseases).

¹⁹³ The critical distinction among the cases, however, is the court's view of the presence or absence of a parental consent or opt-out provision. See *Alfonso*, 606 N.Y.S.2d at 267 (holding that the absence of an opt-out or consent provision invalidates condom distribution program); see also *Parents United I*, 148 F.3d at 264, 275 (noting that the condom distribution program survives parental challenge because it includes a parental opt-out provision); *Curtis*, 652 N.E.2d at 583, 585-86 (disagreeing with the majority in *Alfonso* and holding that no parental consent or opt-out provision is required, because the program is not compulsory).

¹⁹⁴ *Alfonso*, 606 N.Y.S.2d at 266 (internal citations omitted).

¹⁹⁵ *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944) (holding that the family is not beyond regulation in the public interest even in the face of a religious exercise claim).

¹⁹⁶ Minors may legally purchase condoms that are widely available at pharmacies

C. Developing Religious Autonomy and Religious Beliefs

The Supreme Court has recognized the legitimacy of the religious beliefs minors share with their parents.¹⁹⁷ By a null hypothesis, the Supreme Court has accepted the notion that even elementary school children can develop deeply held religious beliefs that command respect under the Constitution. Minors, as well as adults, are protected by the Constitution and "possess constitutional rights."¹⁹⁸ But maturing minors might begin to question their parents' beliefs, and may even develop their own strongly held religious beliefs. Indeed, the search for religious meaning is a quintessential aspect of adolescence.¹⁹⁹

The Supreme Court has never directly confronted the problem raised by Justice Douglas' dissent in *Yoder*: should the state accommodate the religious preferences of parents whose children do not share their religious beliefs?²⁰⁰ Resolution of such a conflict would require delicate balancing within a specific context. Identifying the correct resolution in any particular case is beyond the scope of the current inquiry. The inquiry here is limited to an analysis of the mature minor's right to receive speech that will inform understanding and belief systems. The ability to gather information is a prerequisite to any assertion of a young person's independent claims and preferences.²⁰¹

Consider a seventeen year-old member of the Church of Jesus Christ of the Latter Day Saints preparing for a service

and convenience stores, displayed near mundane items such as "vitamins and cold remedies." See *Alfonso*, 606 N.Y.S.2d at 267.

¹⁹⁷ See *Prince*, 321 U.S. at 171 (Murphy, J., dissenting) (recognizing the "genuine religious" beliefs of a nine-year-old); *West Virginia Bd. of Educ. v. Barnette*, 319 U.S. 624, 629-31 (1943) (Jackson, J.) (emphasizing that the religious exercise rights being asserted belong to the children as well as the parents, and reflect the children's own beliefs); *id.* at 646 (Murphy, J., concurring) (asserting that the state may not force a child to make statements "wrung from him contrary to his religious beliefs"); see also *Wisconsin v. Yoder*, 406 U.S. 205, 241-43 (1972) (Douglas, J., dissenting in part) (noting that even for a youth, religion is a matter of individual conscience).

¹⁹⁸ See *Planned Parenthood of Cent. Mo. v. Danforth*, 428 U.S. 52, 74 (1976) (citing precedential support for the proposition that minors as well as adults possess rights under the Constitution).

¹⁹⁹ See Sara Rimer, *Columbine Students Seek Answers in Their Faith*, N.Y. TIMES, June 6, 1999, at A26 (noting that according to experts, "adolescence is a prime time for seeking spiritual meaning along with personal identity").

²⁰⁰ See *Yoder*, 406 U.S. at 245 (asserting that "[i]t is the future of the student, not the future of the parents, that is imperiled"); *id.* at 244 (arguing that "[t]he children [are] entitled to be heard").

²⁰¹ The question of how courts should balance the competing rights of mature minors possessed of information to support their choices against the rights of parents, and the State's interests, if any, is beyond the scope of this article.

as a missionary.²⁰² He may want to decide before leaving the country if he truly is devout. This young man needs to figure out where he stands before he finds himself at age eighteen in a remote country proselytizing for his faith. The constitutional right to receive information protects such a youth's right to use public libraries to learn about other religions or read criticisms of his own faith.

The opening hypothetical in this article described a sixteen year-old girl who knows that she is dying of leukemia; let us call her Amy. Amy wants to discover her personal religious beliefs so that she can make peace with her god, who might not turn out to be the god in whom her parents believe. Her situation clearly satisfies the limiting criteria for a minor to assert the right to know as described above. Amy is protected by the Free Exercise Clause in her search to make a significant choice, albeit a choice that may lack concreteness in this world. According to some widely accepted belief systems, such as those that emphasize consensual baptism or religious rituals at a deathbed, her choice may not be effective if postponed until after her death.²⁰³ Finally, the imminence of death makes her religious affirmations irrevocable. Assume that Amy's father is an authoritarian religious leader. If Amy is ambulatory, she should be able to learn about other religions by going to the library. If she is confined to a public hospital that offers library services, the hospital should provide her with the material she requests, even over the objections of her parents.

Amy's dilemma becomes even more pressing if her emerging religious beliefs conflict with her parents' convictions regarding the choice of medical treatment.²⁰⁴ Suppose that Amy's parents refuse to consent to blood transfusions or to any type of medical intervention. If the hospital seeks a court

²⁰² Elizabeth Harmer-Dionne, Note, *Once a Peculiar People: Cognitive Dissonance and the Suppression of Mormon Polygamy As a Case Study Negating the Bellef-Action Distinction*, 50 STAN. L. REV. 1295, 1338 (1998) (describing how the Church of Jesus Christ of Latter-day Saints "embarked on a worldwide quest for converts" after the law suppressed the uniqueness of plural marriage).

²⁰³ See PAUL HESSET, INTRODUCTION TO CHRISTIANITY 207-209 (1958); MARY JO WEAVER, INTRODUCTION TO CHRISTIANITY 225 (1991).

²⁰⁴ See *In re E.G.*, 549 N.E.2d 322, 328 (Ill. 1989) (finding that a minor adjudicated mature may exercise her common law right to refuse medical treatment); see generally Lee E. Teitelbaum, *Youth Crime and the Choice Between Rules and Standards*, 1991 BYU L. REV. 351, 369-70 (1991) (noting that even young children reason in a similar fashion as adults, and should therefore be treated as capable of rational choice). For a thoughtful discussion of medical conflict between parents and minors with an emphasis on the competency of minors to participate in decisions about medical care, see Susan D. Hawkins, Note, *Protecting the Rights and Interests of Competent Minors in Litigated Medical Treatment Disputes*, 64 FORDHAM L. REV. 2075, 2095-132 (1996).

order allowing it to treat Amy, the court may seek her informed opinion about her own beliefs.²⁰⁵ Since Amy's life is at imminent risk, a court may well override her religious convictions and order treatment.²⁰⁶ Amy, however, may not be able to testify as to her informed opinion without access to other information systems. The problem is equally complex if we suppose that Amy's parents have no doctrinal objection to medical care, but as Amy pursues her research, she herself adopts a doctrine that bars such treatment. The ultimate course of action will depend on contextual factors, including the likelihood that treatment could actually prolong her life.

D. Independent-Minded Amish Teenagers

The difficult but undeveloped case of ensuring the protection of the Amish child who wants to pursue a secular education, which worried Justice Douglas in his dissent in *Yoder*,²⁰⁷ provides rich hypotheticals that starkly present the need teenagers may have to assert a right to receive information. Assume that the silent Amish teenagers in *Yoder* do, in fact, appear before the court. Barbara Miller testifies that she has doubts about what choice is right, and needs more information before making such an important decision as ending her secular education. Vernon Yutzky asserts that he plans to pursue a medical degree, against his parents' wishes. Either fact pattern presents an equally compelling need for access to ideas through the right to receive information.

Barbara tells the court that she has no idea what she wants to do in the future. She has had very limited exposure to the world, so she cannot compare her Amish community to the possible alternatives. Barbara is willing to consider leaving school and committing to a life as a religious member of the community, as her parents desire. First, however, she would like to read books about the secular world. She is not even asking to see the world, but just wants to read about what life would be like for a nuclear physicist, a ballerina, or even a belly dancer.²⁰⁸ The school and the public library,

²⁰⁵ See *In re Green*, 292 A.2d 387, 392 (Pa. 1972) (remanding for inquiry into the teenage patient's views regarding his mother's religious objection to blood transfusions).

²⁰⁶ See *id.* at 391.

²⁰⁷ See *Wisconsin v. Yoder*, 406 U.S. 205, 244 (1972) (noting that "children should be entitled to be heard" on the important matter of education); *id.* at 237 (Stewart, J., concurring) (arguing that the record does not present "the interesting and important issue" raised by Justice Douglas' dissenting opinion).

²⁰⁸ See *id.* at 240 (White, J., concurring) (noting that some Amish youth "may wish

however, have acceded to her parents' request that she not be allowed access to the books that would answer her questions.²⁰⁹ Barbara's right to receive information in the service of her independent, free exercise claim supports her effort to gain access to books that the school and library regularly make available to other teenagers.

Vernon Yutzy's hypothetical testimony suggests an issue that is starkly presented by a slight adjustment to the facts in *Pierce*, where the Supreme Court held that parents have a liberty interest in controlling the choice of their children's school, including private or parochial schools.²¹⁰ Imagine that instead of removing Vernon from school altogether after eighth grade, his parents enroll him in an Amish school, which is accredited, thereby satisfying the compulsory education laws. Under *Pierce*, Vernon's parents have a constitutionally recognized liberty interest in the option of substituting a religious education for a secular one.²¹¹ Assume, however, that the parochial school that Vernon attends offers a curriculum carefully structured to shield him from "modern" ideas, and that the content of the school's library is selected to reinforce the denominational values in the curriculum.²¹² Under current law, that parochial school is entitled to maintain a closed system of communications that promotes the values of the Amish religion, and no state action is implicated.²¹³

What if 14-year old Vernon cannot use the public library after school, because the librarian accedes to his parents' request that he be denied library privileges?²¹⁴ At what point, if any, would Vernon have the right to use the public library,

to become nuclear physicists, ballet dancers, computer programmers, or historians, and for these occupations, formal training will be necessary"); *id.* at 244 (Douglas, J., dissenting) (pointing out that a child may want to become "a pianist or an astronaut or an oceanographer").

²⁰⁹ See *Davis v. Page*, 385 F. Supp. 395, 398 (D. N.H. 1974) (holding that the rights of children are distinguishable from those of their parents under the First Amendment).

²¹⁰ See *Pierce v. Society of Sisters*, 268 U.S. 510, 520 (1925) (holding that parents have a liberty interest in choosing whether to send their children to public or parochial schools).

²¹¹ *Id.*

²¹² See, e.g., *JAMES G. DWYER, RELIGIOUS SCHOOLS V. CHILDREN'S RIGHTS* 24 (1998) (arguing that many sectarian schools systematically limit access to materials that might be inconsistent with the school's religious doctrine).

²¹³ See *id.* at 45-54 (discussing the scope of permissible state action in directing children's education).

²¹⁴ There is no reason to regard public libraries as an antiquated relic in the age of electronic communication. Vartan Gregorian, president of the Carnegie Corporation, recently stated, "[n]o search engine can replace the library or the librarian . . . [t]he library . . . is the 'people's palace.' It contains the DNA of our culture." *Public Lives: Help for Libraries*, N.Y. TIMES, June 11, 1999, at B2.

even if his parents will not countersign his application for a library card?²¹⁵ The right to receive information that will preserve Vernon's options in life rather than make him a "martyr" to his parents' religious beliefs, should mean that if Vernon can get himself to the library, he should be able to read science books, including books about evolution, the reproductive system and space travel.²¹⁶ Once again, an experienced librarian may be designated to assess such requests from mature minors.

Vernon's challenge to his parents' right to remove him from the public school system would present a more delicate dilemma. He might argue that he has a right to attend the public school to which his parents would be entitled to send him.²¹⁷ If enrolled in that public school, Vernon would demand the right to pursue the standard science curriculum including biology and evolution, despite the objections voiced by his parents. Both steps—enrollment in the school and enrollment in the course over his parents' objections—would raise difficult questions of first impression.

There is ample support for Vernon to succeed in both efforts based on these facts. First, Vernon has a right to receive ideas in his developmental search to be the "master[] of [his] own destiny."²¹⁸ Second, the religious exemption Vernon's parents seek to enforce concerns their own religious exercise claims, which he has publicly renounced. Third, the state has "a high responsibility for education of its citizens [] to impose reasonable regulations for the control . . . of basic education."²¹⁹

Respecting parental control over their children's education does not mean that the state is powerless to protect children from parents who elect not to provide an education that pre-

²¹⁵ A policy under review in Fairfax County, Virginia would allow parents to notify the library that they wish to deny their child under age 13 all access to the Internet. Children over the age of 13 would have unlimited Internet access. See Victoria Benning, *Should Children Be Kept Offline? Fearing Porn, Fairfax Libraries May Limit Access to Internet*, THE WASHINGTON POST, Oct. 15, 1997, at B1.

²¹⁶ See *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944) (stating that the state may limit parents' religious and parental rights by, among other requirements, requiring school attendance so that parents may not make "martyrs" of their children).

²¹⁷ See *Davis v. Monroe County Bd. of Educ.*, 119 S. Ct. 1661, 1681 (1999) (Kennedy, J., dissenting) (stating that, "[p]ublic schools are generally obligated by law to educate all students who live within defined geographic boundaries").

²¹⁸ *Wisconsin v. Yoder*, 406 U.S. 205, 245 (1972) (Douglas, J., dissenting in part) (stating that "[i]t is the student's judgment, not his parents', that is essential if we are to give full meaning to what we have said about the Bill of Rights and of the right of students to be masters of their own destiny.").

²¹⁹ *Id.* at 213; see also *Bartels v. Iowa*, 262 U.S. 404, 412 (1923) (Holmes, J., dissenting) (arguing that the state may have an interest in ensuring that all children receive the same education with regard to language).

parens them for secular life. Education, the Supreme Court has emphasized, "has a fundamental role in maintaining the fabric of our society."²²⁰ In terms of the societal interests involved, which include citizenship, self-sufficiency, and the opportunity for social mobility,²²¹ it should not make any difference whether the obstacle to receiving information is racism,²²² discrimination against the children of undocumented immigrants,²²³ poverty,²²⁴ or the decisions of the parents themselves. The constitution of almost every state guarantees the state's children a public education through secondary school.²²⁵ States retain the right to license and supervise non-public schools, and to deny accreditation to such schools if they fall beneath an acceptable threshold.²²⁶ Even where parents decide to educate their children at home, the state retains the ability to enforce minimal educational standards.²²⁷ Since courts around the country agree that the state may act to ensure that children being home schooled receive an adequate education,²²⁸ it follows logically that the state can overrule requests to compromise education for indi-

²²⁰ *Plyler v. Doe*, 457 U.S. 202, 221 (1982).

²²¹ See *id.* at 222 (holding that although education is not a "right" guaranteed by the Constitution, the benefits derived therefrom place it in a position of supreme importance in our society).

²²² See *Brown v. Board of Educ.*, 347 U.S. 483, 493 (1954) (holding that segregating children in public schools solely on the basis of race deprives minority children of equal educational opportunities).

²²³ See *Plyler*, 457 U.S. 202 (1982) (striking down a Texas statute that authorized local school districts to deny enrollment to children of illegal immigrants).

²²⁴ See *McDuffy v. Secretary of the Executive Office of Educ.*, 415 Mass. 545, 551 (1993) (concluding that the Commonwealth had a constitutional duty to ensure the education of each child in the Massachusetts public school system); *Abbott v. Abbott v. Burke*, 710 A.2d 450, 454 (N.J. 1998) (mandating the implementation of remedial measures by the state to ensure that public school students from poor neighborhoods receive constitutionally-guaranteed educational entitlements).

²²⁵ *Davis v. Monroe County Bd. of Educ.*, 119 S. Ct. 1661, 1681 (1999) (Kennedy, J., dissenting) (citing constitutional provisions of various states guaranteeing students a free primary and secondary public school education). To be sure, these constitutional guarantees do not necessarily mean that the state itself provides an adequate education. See AMERICAN BAR ASSOCIATION PRESIDENTIAL WORKING GROUP ON THE UNMET LEGAL NEEDS OF CHILDREN AND THEIR FAMILIES, *AMERICA'S CHILDREN AT RISK: A NATIONAL AGENDA FOR LEGAL ACTION* 26-27 (1993).

²²⁶ See generally *Murphy v. Arkansas*, 852 F.2d 1039, 1042 n.4 (8th Cir. 1988) (noting that the state's power to enforce standards for non-public schools is "a sensible corollary" of the parental right to use such schools to satisfy compulsory education laws upheld in *Pierce*).

²²⁷ See *id.* at 1044 (agreeing with the Court's precedent in stating that although parents have a right to decide how to educate their children, this right is not absolute and may be interfered with by the state).

²²⁸ See Lisa M. Lukasik, *The Latest Home Education Challenge: The Relationship Between Home Schools and Public Schools*, 74 N.C. L. REV. 1913, 1946-47 (1996) (discussing several cases as well as state constitutions and statutes which support the contention that home education is not "free from all state regulation or control").

vidual children enrolled in the public schools.²²⁹

Vernon's hypothetical situation results from the refusal of his parents to acknowledge that he does not share their religious convictions, and from their efforts to deny him a standardized education. Where parental discretion to supervise education severely limits a minor's opportunity and interferes with the exercise of fundamental autonomy rights, public institutions such as schools can provide balance for parental restrictions.²³⁰ The obligation of public institutions to preserve the minor's right to receive information would flow from the combination of the teenager's right to knowledge and the state's interest "that children be both safeguarded from abuses and given opportunities for growth into free and independent" citizens.²³¹

E. Gendered Limitations on Access to Information

The doctrine developed in this article stretches beyond the quest for information in the service of the fundamental constitutional rights analyzed above. Gendered differentiation in providing access to information would be very hard for the state to justify—even if undertaken in response to parental requests. Although the Supreme Court has never found sex to constitute a suspect class under the Equal Protection Clause,²³² in modern times it has uniformly subjected gender differentiation to heightened scrutiny.²³³ It seems clear that

²²⁹ See *Altman v. Bedford Cent. Sch. Dist.*, 45 F. Supp.2d 368, 383, 385-86, 396 (S.D.N.Y. 1999) (holding that public school parents do not have the right to remove their children from required classes covering such topics as Indian culture and the Hindee religion, the life of Buddha, or Quezacoatl, and that there is no constitutional basis for a blanket "parental opt-out" privilege).

²³⁰ See *Lupu*, *supra* note 79, at 1320; *Woodhouse*, *supra* note 127, at 412 (arguing for a shared responsibility for all children in which parents and public institutions such as schools would play collaborative roles).

²³¹ *Prince v. Massachusetts*, 321 U.S. 158, 165 (1944) (holding that the family is not beyond regulation in the public interest even in the face of a free exercise claim).

²³² See *United States v. Virginia*, 518 U.S. 515, 532-33 (1996) (Ginsburg, J.) (holding that sex is not a proscribed classification like race or national origin, and thus is not subject to strict judicial scrutiny).

²³³ *Id.* at 531 (holding that official classification based on gender places a heavy burden on the state to demonstrate a real, "exceedingly persuasive justification"); see also *id.* at 558 (Rehnquist, C.J., concurring) (quoting *Craig v. Boren*, 429 U.S. 190, 197 (1976), where the Court announced that "[t]o withstand constitutional challenge . . . classifications by gender must serve important governmental objectives and must be substantially related to achievement of those objectives"); *Virginia*, 518 U.S. at 532 (noting that, beginning with its decision in *Reed v. Reed*, 404 U.S. 71 (1971), the Supreme Court has recognized that the government must act compatibly with the Equal Protection principle as applied to women); *Ruth Bader Ginsburg, Gender and the Constitution*, 44 U. CIN. L. REV. 1, 17-23 (1975) (tracing the application of heightened scrutiny for gender since 1971).

schools may not initiate gender based curricular distinctions consistent with the principle of equal protection.

The question arises here, however, whether a public school may accommodate a parental request that their male and female children receive different educational programs. The issue is important, since a significant number of parents who remove their children from public schools for religious reasons take issue with what they perceive to be the "unisexual movement where you can't tell the difference between boys and girls" in the public schools.²³⁴

Suppose that the father of a girl enrolled in public school believed that girls should not take math or science courses because to do so would be "against nature." Suppose further that he would not let his daughters participate in such classes. Assume as well that it is legally irrelevant whether the parents' decision rests in religious or secular beliefs, because the school district recognizes a parent's right to seek exemption from any course requirement for any reason. The girl in question, on the other hand, avidly desires the same education offered to her peers of both sexes.²³⁵ She demands that the school enroll her in math and science. The school, and the courts, might reject an equal protection claim, on the grounds that the primary actor under this formulation appears to be the parent.²³⁶ The emerging constitutional right to receive information for mature minors might well provide a remedy for that girl. The right to receive information would help young people to gain the "equal opportunity to aspire, achieve, participate in and contribute to society based on their individual talents and capacities."²³⁷ That girl, successful in her demand for an equal educational opportunity, could grow up to be a rocket scientist.

²³⁴ *Duro v. District Attorney*, 712 F.2d 96, 97 (4th Cir. 1983) (quoting part of a father's explanation of his reasons for home schooling, rejected by the court); see also DWYER, *supra* note 212 at 26-27, 39-40.

²³⁵ I reserve the question of whether accommodating parental distinctions based on gender would be an appropriate exercise of state power if the girl shared the views of her parents or, at least, did not object.

²³⁶ If the school district itself differentiated in schedule or assignments based on gender, Title IX of the Education Amendments of 1972 would presumably provide a cause of action. See 20 U.S.C. § 1681(a) (stating that no person shall "be subjected to discrimination under any education program" receiving federal funds "on the basis of sex"). I am not aware of any reported case brought under Title IX involving assignments or differentiated curricula within a coeducational school, probably because such a fact situation would blatantly violate the statute.

²³⁷ *Virginia*, 518 U.S. at 532. Gender bias is not necessarily limited to girls, although it is most frequently manifested in that direction. A parallel situation would be presented if the parents of a boy asked that he not be allowed to enroll in home economics courses, and he wanted to become a chef.

III. CONCLUSION

The commitment to pluralism inherent in the ideal of robust debate runs through the various clauses of the First Amendment. Those values have long ignited profound controversy. Some citizens often find it difficult to reconcile the idea that the state promotes and protects pluralism, on the one hand, with treasured notions of parental domination and family privacy on the other. Analytically, however, those two strands co-exist. Both find ample support in law and culture. The differing emphasis of the two principles, however, sometimes results in complex conflicts in which the interests of parents, minors and the state appear to be irreconcilable.

I recognize that for many readers the scenario of children successfully challenging their parent's educational choices resembles a cliff, rather than just a slippery slope, over which the entire concept of parental supervision will plummet.²³⁸ After all, what would become of the American family without the ability of parents to threaten their children with such statements as: "if you don't start behaving/respecting/performing we'll ship you off to military school!" My argument is not intended to challenge the principle that responsible parents, who prepare their children for life as adults, will continue to guide their child's education.²³⁹ The child will not normally be able to seek a legal remedy regarding the choice of school or curricular choices, nor would a school normally respond to that child's protests. But the very prospect of such interference with parental prerogatives raises adult anxieties about diminishing parental control over children and the intrusive potential of the state and its laws.

The maturing minor, however, has another set of concerns equally recognized by the Constitution. The Constitution grants minors a certain degree of autonomous rights, which increase in relation to capacity. Within the notion of capacity, the right to receive ideas is an essential prerequisite for the exercise of rational choice. It is essential as well to the development of autonomy and to informed decisions about

²³⁸ See Martha Minow, *What Ever Happened to Children's Rights?*, 80 MINN. L. REV. 267 (1995) (noting that some critics view children's rights as incompatible with parental authority); see also Hafen & Hafen, *supra* note 168, at 472-73 (stating that the notion that children have privacy rights may run counter to the concept of parental control).

²³⁹ I am not arguing here that children have a legal right to force their parents to take their views into account, to demand that their parents send them to a non-public school, or to "receive an education that corresponds to [the child's] wishes, inclinations and talents" as provided in Finland's 1983 Child Custody and Rights of Access Act. See Hafen & Hafen, *supra* note 168, at 463 n.71.

whether or not minors share their parents' values. Both of these notions are preconditions for a mature minor's meaningful exercise of constitutional rights.

Ample precedent supports the right of mature minors to receive information in the public domain over their parents' objections. First, as demonstrated in Part I, the right to receive information has long been recognized for adults as a necessary corollary to the freedom to speak. Courts have applied the right to receive information to children as well. Second, children possess rights under the Speech Clause. Third, mature minors possess constitutional rights that protect their emerging autonomy claims, which create a need for information. That individual need for knowledge on which to base critical decisions is reinforced by the First Amendment's commitment to protecting a marketplace of ideas.

The proposal that our jurisprudence expressly recognize a right for mature minors to receive information will not result in a "surrender [of] control" from adults to young people, such as Justice Black feared when he dissented from *Tinker*.²⁴⁰ The right outlined here would not be available on a whim. A minor could only invoke the right to receive information where state action is implicated, where the minor can establish legal "maturity," and in order to enhance the meaningful exercise of another right, such as the right to abortion, contraception or free exercise of religion.

In order to avoid moving family conflicts into public settings, the right of a minor to receive information would be subject to an additional set of limitations. The minor must have a pressing need to receive the information before achieving the age of majority, when parental objections will no longer be entitled to any legal, as opposed to personal, deference. A pressing need would be established where the mature minor confronts a significant decision that implicates constitutional liberties, where the decision cannot be postponed, and the consequences of the decision are irrevocable.

Once we articulate a normative constitutional right for mature minors to receive information under such circumstances, the assumption that the state has discretion in relation to family conflicts about access to information shifts. If minors have a constitutional right to receive information, upon satisfaction of the limiting principles proposed here, that right would create a strong new presumption that the

²⁴⁰ See *Tinker v. Des Moines Indep. Sch. Dist.*, 393 U.S. 503, 526 (1969) (Black, J., dissenting) (stating that the Federal Constitution, in his view, does not compel "teachers, parents, and elected school officials to surrender control of the American public school system to public school students").

state should accommodate the minor's constitutional right to knowledge. The resulting availability of information would enhance the meaningful exercise of a variety of constitutional rights which minors already possess.